TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, ET AL., PETITIONERS,

vs.

WILSON DISTILLING COMPANY ET AL. AND THE FLEISCHMANN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1906.
CERTIORARI AND RETURN FILED DECEMBER 23, 1906.

(21,421.)

(21,421.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, ET AL., PETITIONERS,

vs.

WILSON DISTILLING COMPANY ET AL. AND THE FLEISCHMANN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Page.
Transcript from the circuit court of the United States for the district of South Carolina	1
Caption	1
Bill of complaint in Wilson Distilling Co. *vs.* W. J. Murray *et al.*	2
Subpœna ad re	6
Restraining order	7
Injunction bond	9
Order modifying restraining order	10
Return and answer	11
Order making new parties complainant	16
Bill of complaint in The Fleischmann Co. *vs.* W. J. Murray *et al.*	17
Subpœna ad re	28
Order to show cause	29
Affidavit of Geo. B. Lester	30
Restraining order	33
Returns on service of writ	34
Order modifying order of injunction	41
Return of defendants	41
Judgment of commission on claim of Ullman & Co. §	52

POOR COPY

	Page.
Affidavit of B. F. Arthur	55
N. Christensen	56
W. H. Macfeat	57
W. H. Macfeat	63
William Banks	72
John T. Meehan	77
Proposition as to Loan and Exchange Bank	81
Appearance of Palmetto National Bank of Columbia	83
Notice of appearance for The Columbia Savings Bank and Trust Company	84
Appearance of The National Loan and Exchange Bank	85
Order continuing injunction	86
Appearance of W. J. Murray *et al*	87
Opinion	88
Affidavit of George B. Lester	99
Ansel takes a hand	100
Affidavit of George B. Lester	101
Order granting leave to file amended and supplemental bill	104
Amended and supplemental bill of complaint in Wilson Distilling Co. *vs.* W. J. Murray *et al*	105
Subpœna ad re	121
Order to show cause	122
Returns on service of writ	123
Order allowing Jack Cranston Co. to intervene as a party complainant	127
Petition of Big Springs Distilling Co. to intervene and order allowing same	128
Ullman & Co. to intervene and order allowing same	130
Anchor Distilling Co. to intervene and order allowing same	133
Belair Distilling Company to intervene and order allowing same	135
Richard & Co. to intervene and order allowing same	137
D. Sachs & Sons to intervene and order allowing same	140
Order continuing injunction	143
Order making certain banks parties defendant and restraining order	144
Subpœna ad re	146
Returns on service of writ	148
Petition of intervention of Frank G. Tulldge Co. *et al*	156
Prayer of Dispensary Commission joining in petition of Frank G. Tulldge *et al*	171
Order authorizing Dispensary Commission to pay out certain funds	172
Petition of Messrs. Merrick & Barnard	173
Order to pay Lawrence Maxwell, Jr., amounts due Belroy-Distilling Co. and H. A. Theirman & Co	174
Petition of New York and Kentucky Company and order thereon	175
Return of W. J. Murray *et al*	177
Affidavit of T. M. Mordecai	187
Order appointing temporary receivers	189
Order consolidating causes and appointing receivers	190
Order fixing bonds of complainants	193
Oath of Joseph A. McCullough, receiver	194
Oath of B. F. Arthur, receiver	194
Oath of C. K. Henderson, receiver	195
Surety bonds of B. F. Arthur	196

Page.
Bond of Joseph A. McCullough 197
Bond of C. K. Henderson 201
Undertaking on injunction 202
Injunction bond 203
Order authorizing depositories to honor checks and modifying former order 205
Order converting bill into an intervention and staying further proceedings 206
Bill of intervention of Garrett & Co. 206
Exhibit A—Statement of account 212
Answer and return 213
Exhibit A [1]—Letter, Garrett to Crum, October 28, 1902 218
A [2]—Letter, Garrett to Richbourg, October 28, 1902 219
A [3]—Letter, Garrett & Co. to board of directors, November 28, 1902 220
A [4]—Bid of Garrett & Co., November 28, 1902 220
A [5]—Letter, Garrett & Co. to Board of Control, May 28, 1903 221
A [6]—Letter, Garrett & Co. to Charles, August 22, 1904 222
A [7]—Affidavit of E. L. Price 222
A [8]—Affidavit of W. O. Tatum 223
A [9]—Affidavit of John Bell Towell 223
A [10]—Affidavit of Thomas W. Collina 224
A [11]—Affidavit of M. H. Mobley 224
A [12]—Affidavit of G. T. Holly 225
B [1]—Resolution of commission 226
C [1]—Summons to W. J. Murray *et al* 226
D [1]—Complaint in case of Garrett & Co. *vs.* W. J. Murray *et al* 227
Notice of motion to vacate injunction 230
Petition for mandamus in supreme court of South Carolina 232
Petition 232
Rule to show cause 234
Return to rule 235
Exhibit A—Bill of complaint of Wilson Distilling Co. in United States circuit court 237
Restraining order 242
Order making new parties 244
Amended and supplemental bill 245
Order to show cause 260
Subpœna 261
Exhibit B—Bill of complaint of The Fleischmann Company in United States circuit court 262
Restraining order 273
Affidavit of Geo. B. Lester 274
Restraining order 277
Traverse to return 279
Decision of supreme court of South Carolina on petition for mandamus. 280
Traverse to the return of the defendants to the rule and order to show cause 296
Opinion on motion to vacate injunction and receivership orders 298
Order dismissing motion to revoke former orders of court granting injunctions and appointing receivers 301

Page.
Order granting leave to amend bill and amended bill 302
Amendment to bill and amended bill 302
Order revoking order requiring defendants to answer on rules day in April 306
Order to pay attorney general of South Carolina $15,000 upon application therefor 307
Summons and severance 307
Affidavit of W. J. Murray 309
Petition for allowance of appeal 311
Assignment of errors 314
Order allowing an appeal and severance 318
Bond on appeal 319
Citation 320
Acknowledgment of service of citation 321
Return on service of citation 324
Order striking Anheuser-Busch Brewing Association from record 325
Order to transmit record 325
Clerk's certificate 326
Stipulations to omit from printed records evidence in Ullman case 326
Proceedings in United States circuit court of appeals 329
Motion of appellees to dismiss appeal 329
Argument on motion and merits 330
Opinion 331
Order staying mandate 375
Decree 375
Order staying mandate for thirty days additional 376
Clerk's certificate 377
Clerk's return to writ of certiorari 378
Stipulation as to return 378
Writ of certiorari 379

TRANSCRIPT OF RECORD.

Caption.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT,
FOURTH CIRCUIT.
} IN EQUITY.

At a Circuit Court of the United States for the District of South Carolina, begun and held at Asheville, North Carolina, on the 29th day of February, 1908, and the 7th day of March, 1908.

Present: The Honorable J. C. Pritchard, United States Circuit Judge for the Fourth Judicial Circuit, Presiding.

Among other were the following proceedings, to-wit:

Wilson Distilling Company et al., Complainants,
versus
W. J. Murray et al., Defendants.

The Fleischmann Company, Complainant,
versus
W. J. Murray et al., Defendants.

Wilson Distilling Company et al., Complainants,
versus
W. J. Murray et al., Defendants.
and
The Fleischmann Company, Complainant,
versus
W. J. Murray et al., Defendants.

} Consolidated Causes.

Bill of Complaint.

(2) Filed December 31, 1907.

In the Circuit Court of the United States for the District of South Carolina. In Equity.

Wilson Distilling Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.
} Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

Wilson Distilling Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of New Jersey, and a resident and citizen of said State of New Jersey, having its principal place of business at Baltimore, in the State of Maryland, brings this, its bill of complaint, against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, citizens and inhabitants of the State and District of South Carolina, the said W. J. Murray residing in the City of Columbia; the said John McSween in the City of Timmonsville; the said B. F. Arthur in the City of Union, the said C. K. Henderson in the City of Aiken and the said Avery Patton in the City of Greenville in said State.

And therefore your orator complains and says:

1. That the Wilson Distilling Company, complainant, is a body corporate under the laws of the State of New Jersey and is a resident and citizen of the said State of New Jersey, having its principal place of business in the City of Baltimore in the State of Maryland.

2. That the defendants are citizens and residents of State of South Carolina.

3. That the matter in controversy in this action exceeds in value the sum of two thousand dollars exclusive of interest and
(3) and cost, as will hereinafter more fully appear.

4. That on or about the 16th day of February, 1907, the Legislature of the State of South Carolina enacted a statute

providing for a appointment of a Commission, to be composed of five persons, to wind up the affairs of the State dispensary which had theretofore existed in said State for several years and which had theretofore been abolished by a prior enactment of the Legislature of said State.

5. That the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, were duly appointed members of said Commission, and duly accepted and qualified as such prior to March 17, 1907, and have ever since composed the said Commission.

6. The said Statute provides *inter alia* that "It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable."

7. That on or about the —— day of ————, 1906, your orator sold to the said State Dispensary of State of South Carolina through its Directors, who were the proper officers authorized by law to purchase wines and liquors for said Dispensary, whiskies and liquors to the amount and value of two thousand nine hundred and seventy-nine and 12/100 dollars ($2,979.12), and your orator shipped said goods to the State Dispensary and the same were accepted by it through its duly authorized officers, and as your orator is informed and believes the same were sold by said Dispensary at a large profit; that an invoice and account of the goods so sold and delivered were duly rendered by your orator to said State Dispensary through its proper officers and agents and the same was duly accepted and approved and the amount thereof became due to your orator as upon account stated.

8. That no part of the price of said whiskies and liquors has ever been paid, and the whole thereof was justly due the (4) complainant by said State Dispensary at the time of the appointment of said Commission and still is justly due it. That said whiskies and liquors so sold to the said Dispensary were reasonably worth the sum of two thousand nine hundred and seventy-nine and twelve one-hundredth dollars ($2,979.12).

9. Your orator further alleges, upon information and belief, that the defendants have closed out and disposed of all the stock and personal property of said Dispensary, and col-

lected all debts due it and that said defendants now have on hand funds sufficient to satisfy and pay off in full all just and proper claims against said Dispensary, but your orator is advised and believes and so charges, that said defendants deny that there is enough money in the hands of the Commission with which to pay said claims and that said defendants have lately made such denial in a verified answer filed by them in a cause depending in this court wherein Garrett and Company are the complainants and the defendants above named are defendants. Your orators are informed, advised and believe and aver the facts to be, that if any such deficiency exists, as is claimed by said defendants, that the same has occurred by reason of the fact that said defendants have approved and allowed, and are about to pay, a large number of claims which have not been properly audited and many of which are for improper and excessive amounts and others of which, for large amounts, are not valid claims against said Dispensary or against the fund in the hands of the defendants by reason of the fact that they are for sales illegally made in that they did not comply with the laws of said State governing sales to said Dispensary.

10. Your orator further alleges, upon information and belief, that said defendants propose to, and unless restrained by the order of this court, will arbitrarily pay a portion of the claims against said Dispensary and pay over the balance and a large part of the funds in their hands as aforesaid, into the public treasury of the State of South Carolina. And your orator alleges that such proposed action of said defendants would operate to defeat the just claim of your orator and of (5) other persons having just claims against the Dispensary and against said fund.

11. Your orator is advised and believes that the enactment of the Legislature of South Carolina, as aforesaid, imposed upon the defendants the duty to pay the claim of your orator out of said moneys in their hands.

12. That your orator has demanded of defendants the payment of said claim out of said funds but they have failed and refused and still fail and refuse to pay the same.

13. That unless they are restrained by preliminary injunction the defendants will pay out on improper claims a large part of the funds in their hands aforesaid and will cover into the public treasury of the State of South Carolina a large

part of said fund, to the irreparable damage of your orator and of other persons having just claims against said Dispensary and against said fund in the hands of the defendants.

14. Each and every allegation of fact in this bill contained is made upon information and belief of the solicitor for the complainant, by whom the same is verified.

15. This suit is brought by your orator on its own behalf and on behalf of all other persons having just claims against said State Dispensary and against the fund in the hands of the defendants, who may hereafter join herein.

To the end therefore that your orator may have that relief which it can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by your orator, he now prays the court that a preliminary injunction be issued restraining said defendants and each and every of them from paying over or disposing of said funds to any creditor or to the public treasurer of the State of South Carolina until the proper amounts due each creditor shall have been first duly ascertained and determined as this court may (6) direct until final hearing herein; and that your orator may have such other, further and general relief in the premises as the nature of the circumstances of the case may require.

May it please your honor to grant to your orator a writ of subpœna to be directed to the said W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, thereby commanding them at a certain time and under a certain penalty therein to be limited personally to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity.

And your orator will ever pray.

T. M. MORDECAI,
FRANK CARTER &
H. C. CHEDESTER,
Solicitors for Complainants.

Verification of Bill of Complaint.

THE UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company
vs.
W. J. Murray et al.

Frank Carter, being sworn, says that he is one of the solicitors for the complainant in the above entitled suit and that he verifies this Bill of Complaint herein on behalf of said complainant; that said verification is made by this affiant for the reason that said complainant is a foreign corporation and that no officer or agent of said corporation capable of making said cerification is present within the district or place where said Bill of Complaint was prepared to the knowledge and belief of this affiant; that the foregoing Bill of Complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(7) FRANK CARTER.

Sworn to and subscribed before me this the 30th day of December, 1907.

GILMER WELCH,
[Seal] Notary Public.

Subpœna Ad Re.

(8) Filed December 31, 1907.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

The President of the Pnited States of America to W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton:

You are hereby strictly commanded and firmerly enjoined that all manner of excuses being laid aside, you be and appear before the Judges of the Circuit Court of the United States for the District of South Carolina at Charleston, S. C., on the Rules day of February, twenty days after the service thereof; then and there true and perfect answer to make upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the Bill of Complaint of Wilson Distilling Company.

And also, That you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the Registry of said Court, your plea, answer or demurrer, to the said bill of complaint.

Herein fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in South Carolina, District aforesaid, the 30th day of December, in the year of our Lord one thousand nine hundred and seven, and in the one hundred and 33d year of the Soverignty and Independence of the United States of America.

T. M. MORDECAI,
FRANK CARTER,
H. C. CHEDESTER,
Complainant's Solicitors.

Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit, in the Clerk's office of the Circuit Court of the United States for the District of South
(9) Carolina, on or before the first Monday of February, 1908, otherwise the bill will be taken pro-confesso against them.

C. J. MURPHY,
[Seal] C. C. C. U. S. Dist. S. C.

Restraining Order.

(10) Filed December 31, 1907.

In the Circuit Court of the United States for the District of South Carolina. In Equity.

Wilson Distilling Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.
} Order.

Upon hearing read the verified Bill of Complaint herein, praying for an injunction restraining the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, their successors, agents and attorneys from pay-

ing over or disposing of the funds in their hands as Commissioners for the purpose of winding up the State Dispensary of the State of South Carolina, to any creditor or to the Public Treasurer of said State, until the proper amount due each creditor shall have first been duly ascertained and determined, as the court may direct until the final hearing herein, and it appearing therefrom that the said defendants may proceed to pay out and pay over said fund to the irreparable damage of the complainant, unless restrained therefrom:

Now, in consideration thereof, and upon motion of T. M. Mordecai, Frank Carter and H. C. Chedester, solicitors for the complainants.

It is ordered that said defendants, their successors, agents and attorneys, and each and every of them be, and they are hereby restrained from paying over or disposing of the funds in their hands as aforesaid, to any creditor or to the Public Treasurer of said State, until the proper amount due each creditor shall have first been ascertained and determined, as the court may direct, until the further order of this court.

And it is further ordered that said defendants be, and they are hereby required to show cause, if any they have, before me, on the 11th day of January, 1908, at the United States Court House in Asheville, in the State of North Carolina, at 10 o'clock in the forenoon, why the said defendants, their successors, agents and attorneys, and each and every of them, (11) should not be so restrained until the final hearing herein.

And it is further ordered that a copy of this order and of the Bill of Complaint herein be served upon said defendants.

And it is further ordered that the complainant above named do execute a bond in the penalty of five thousand dollars ($5,000.00), conditioned for the payment of the defendants of all damages and costs they or either of them may sustain by reason of this order, should the same hereafter be adjudged to have been improvidently made, as to all or any of them; that said bond shall be duly approved by either of the Circuit Judges of this Circuit, or by any of the District Judges of the District of South Carolina, or by the Clerk of this Court at Asheville, N. C.

And it is further ordered that any defendant hereto have leave to move before me at any time before the hearing herein ordered, upon five days notice to the solicitors for the complainant, to vacate this order or any part thereof, as to such defendant.

Done at Asheville, North Carolina, at Chambers, this the 30th day of December, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

Marshal's Return on Service.

(12) Filed December 31, 1907.

UNITED STATES OF AMERICA,
District of S. C.

I hereby certify and return that I served the annexed Bill of Complaint Sub Ad Re and Order on the therein named W. J. Murray, John McSween, C. K. Henderson & Avery Patton, at Columbia, S. C., on Jany. 1, 1908, and on B. F. Arthur, at Union, S. C., on Jan. 2, 1908. By handing to and leaving a true and correct copy thereof with each personally at places stated in said District on the 1 & 2 day of Jany., A. D., 1908.

J. DUNCAN ADAMS, U. S. Marshal.
V. P. CLAYTON, Deputy.

Injunction Bond.

(13) Filed 31st December, 1907.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Wilson Distilling Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.

Undertaking on Injunction.

Know all men by these presents, that we, Wilson Distilling Company, as principal, and American Bonding Company of Baltimore, as surety, undertake and become bound to W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, the defendants above named, in the sum of five thousand dollars ($5,000.00), lawful money of the United States of America, well and truly to be paid to them; to be void, however, if the plaintiff is the above entitled action shall pay to the defendants above named such damages, not exceeding the sum above specified, as they may sustain by reason of the restraining order and injunction granted by His Honor, J. C. Pritchard, United States Circuit Judge, on the 30th day of

December, 1907, if the court shall finally decide that the said plaintiff was not entitled to said restraining order and injunction.

This December 30th, 1907.

WILSON DISTILLING COMPANY, [Seal]
By H. C. CHEDESTER, Its Attorney & Solicitor.
AMERICAN BONDING COMPANY
OF BALTIMORE,
By LOUIS M. BOURNE, Local Vice-President.

Attest:

[Seal] JNO. P. KERR,
Local Assistant Secretary.

AMERICAN BONDING COMPANY
OF BALTIMORE,
By T. MOULTRIE MORDECAI, Attorney in fact.

The foregoing bond is affirmed, Dec. 30th, 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

Order Modifying Restraining Order.

(14) Filed January 13, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Wilson Distilling Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.
} Order.

It is ordered that the hearing upon the temporary restraining order heretofore granted in the above entitled cause be continued, to be heard before his Honor J. C. Pritchard, United States Circuit Judge, at his Chambers, in Asheville, North Carolina, on the 29th day of February, 1908; and that said temporary restraining order continue of force until so heard.

This order is without prejudice to the right of the defendants and they are hereby allowed in the meantime to proceed to audit and allow the claims of the creditors of said State Dispensary and to apply to this court from time to time for leave to pay the claims so audited and allowed. The Clerk will certify a copy of this order to each of the defendants.

This the 11th day of January, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Return and Answer.

(15) Filed Feb'y 4th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Wilson Distilling Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the District of South Carolina:

The defendants to the above Bill of Complaint for answer and return to the rule herein show:

1. That they have no information upon which to base an affirmation or denial of the allegations of the first paragraph of the petition, and, therefore, demand strict proof of the same.

2. That they admit the second paragraph.

3. That they admit that the plaintiff claims more than two thousand dollars to be due it from the State of South Carolina.

4. They admit the allegations of the fourth paragraph of the petition.

5. They admit the allegations of the fifth paragraph of the petition.

6. They admit the allegations of the sixth pargraph of the petition.

7. That they have not sufficient information upon which to admit the seventh paragraph, and, therefore, they deny the same and demand strict proof thereof.

8. They deny the allegations of the eighth paragraph of the complaint and allege that a part of the account has already been taken off by discount. And they deny on information and belief that there is the amount still due which is alleged in the eighth paragraph of the complain*ant*.

9. They admit that they have closed out, as in law they (16) were required to do, the entire stock of the State Dispensary, and that they have collected and have on hand more than sufficient money to satisfy the claims of creditors, and they admit that in an answer filed in the case of Garrett & Company against these defendants in this court, that they alleged that there was not enough money on hand to pay creditors, but they deny that this is true at the present time as they have since collected enough money to enable them to pay all creditors in full as listed with them, and that they intend to pay every creditor every dollar that is honestly due. They deny that they have approved and allowed any irregular or illegal claims, or any claims for excessive amounts, and they deny that it is any concern of the plaintiffs what amounts are allowed the other creditors so long as complainants are protected and paid every cent that is due, and they allege that this will be done, but they do allege that the complainant's account is illegal in that it failed in various particulars to comply with the law in making its sales to the State Dispensary, in that it failed to give a proper bond or to furnish a chemical analysis for the goods, and as defendants are informed and believe, it did not furnish a proper bid upon which to base a purchase, and they are informed and believe, also that in a long course of dealing, it grossly and corruptly over-charged the State by collusion with the officials in charge of the State Dispensary, and that on a full accounting of all dealings leading up to the account in question, the State Dispensary will owe the plaintiff nothing as defendants are informed and believe. This information, however, may be incorrect, and the Commission which is defendant here, does not hereby adjudge the same to be facts, but states them as the reason why the claim has not as yet been paid, and sets forth that it is a judicial body, has determined to hear the question as to the amount due on said claims as well as all

other claims, and has set the 18th day of January, 1908, for hearing of the same, it having as a court made up a calender hereto attached as Exhibit "A" in which a day has been assigned for hearing as to each claim not already adjudicated, at which hearing the plaintiff will be entitled to establish its claim by competent proof and when established, and adjudged to be (17) correct, it will be promptly paid.

10. The defendants deny each and every allegation contained in the tenth paragraph of the petition.

11. The defendants allege that the law creating this Commission does impose upon the defendants the duty to pay (*the amounts justly due on the said plaintiff's claim*) and that so soon as such amount is properly adjusted, the said Commission will proceed to make such payment promptly.

12. The Commission denies that any demand has been made upon it for this claim, but alleges that the claim is being dealt with as all other claims, and that it will be paid if found to be correct.

13. The defendants deny every allegation contained in the thirteenth paragraph of the complaint.

14. The defendants deny that the verifications of the bill herein as made is sufficient.

15. The defendants allege that a very large majority of the creditors herein are opposed to the present suit, and they further allege that the said suit will be detrimental to the claims of all the parties holding claims against the State Dispensary, and they submit an affidavit of a majority of the creditors on this subject.

16. The defendants show that this court is without jurisdiction in the premises, it being a suit not only against them as a Commission representing solely the interests of the State of South Carolina and acting of and for the State of South Carolina, and they have no personal interest in the said fund in any way but only as agents and *officer* of the State, and they in addition are acting as a court and this court is without jurisdiction to control or restrain their action as a court no*t* has it jurisdiction to interfere with them in their action as officers of

the State of South Carolina, committing no trespass and threatening the disturbance of no right of the plaintiff, and acting only as the State of South Carolina.

Wherefore they demand that the complaint be dismissed with costs.

J. FRASER LYON, Atty. Gen.
STEVENSON & MATHESON,
Of Counsel.

STEVENSON & MATHESON,
Dfts. Attys.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA.

(18)
Wilson Distilling Company
vs.
W. J. Murray et al.

Personally comes W. J. Murray, the Chairman of the Commission, known as the State Dispensary Commission, who, on oath, says that the allegations of the foregoing answer and return are true of his own knowledge, except as to matters alleged on information and belief, and as to those matters he believes them to be true.

W. J. MURRAY.

Sworn to before me January 3, 1908.

THOS. W. COLLINS,
[L. S.] Notary Public, S. C.

Ex. A.

(19) DOCKET OF STATE DISPENSARY COMMISSION.

Jan.	1,	Fleischmann & Co., Gerson Seligman.
		Ullman & Co.
		Anchor Distilling Co.
Jan.	15,	Anheuser Busch Co.
		H. D. Thierman & Jno. T. Barbie.
"	16,	Joseph Schlitz Brewing Co.
"	17,	Wm. Lanahan & Son.
"	18,	Clark Bros. & Co.
		Arthur Lehman & Co.
		Wilson Distilling Co.
"	20,	The King Co. (J. W. Kelley & Co.)
		Acme Brewing Co.
"	21,	H. & H. W. Catherwood.
		Jack Cranston Co.
"	22,	New York and Kentucky Distilling Co.
		Bellroy Distilling Co.
"	25,	The Paul Jones Co.
		Green River Distilling Co.
"	27,	The Big Springs Distilling Co.
		Richards & Co.
"	28,	Rosenegk Brewing Co.
		Strauss Pritz Co.
"	29,	Garrett & Co.
		Belair Distilling Co.
"	30,	J. E. Pepper Distilling Co.
		The Live Oak Distilling Co.
"	31,	Joseph A. Magnus & Co.
		Moyse Bros.
Feb.	1,	D. Sach & Co.
"	4,	W. W. Johnson & Co.
		Gallagher & Burton.
"	5,	H. Rosenthal & Sons.
"	6,	Big Four Distilling Co.
"	7,	Old Seventy-Six Distilling Co.
		Geo. A. Dickel & Co.
"	8,	J. F. Beckman & Co.
"	10,	Frank G. Tullidge & Co.
		Augusta Brewing Co.
"	11,	Darley Park Brewing Co.
"	12,	Savannah Brewing Co.

The cases will be called on the dates assigned and pro-
(20) ceeded with if reached, and if not reached, will be called

in their order on the Docket. The parties will be notified in due time if their cases can be reached before the date set.

W. F. STEVENSON, Attorney
State Dispensary Commission.

Ex. B.

Wilson Distilling Company
vs.
W. J. Murray et al.

(21) Personally comes J. L. Thorpe, who, on oath, says he has been in charge of the records of the State Dispensary of South Carolina as Chief Clerk of the State Dispensary Commission since the appointment of said Commission, and that he has made diligent search for a bond of Wilson Distilling Company to comply with the award made it at the September bids in 1906, at which the award was made out of which its bill grew, and no such bond is to be found among the records. Further that no bid was filed on which such award was made or shown by the bid book, the last bid filed being for the June, 1906, meeting.

J. L. THORPE.

Sworn to before me January 3, 1908.

THOS. W. COLLINS,
Notary Public, S. C.

Order Making New Parties Complainant.

(22) Filed Feb. 17, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT. IN EQUITY.

Wilson Distilling Company
vs.
W. J. Murray et al.

Anheuser-Busch Brewing Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of said State, and Charles J. Gallagher and Edward Burton, co-partners as Gallagher & Burton, both of whom are citizens and residents of the State

of Pennsylvania, appearing through their counsel, B. A. Hagood and Frank Carter, and seeking to be made parties complainants hereto, and intervening for that purpose.

It is ordered that the above named parties be and they are hereby permitted to intervene herein and that they be and are hereby made parties complainants herein.

This the 29th day of January, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Bill of Complaint.

(23) Filed Jan. 23, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleishmann Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

To the Honorable Judges of the Circuit Court of the United States for the District of South Carolina:

The Feishmann Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and a citizen of said State, brings this, its bill against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of the State of South Carolina, and said defendants individually, all of whom are citizens and residents of said State of South Carolina, and, thereupon, your orator complains and says:

I.

That your orator, The Fleishmann Company, was, at all times hereinafter mentioned, and still is, a corporation, duly created, organized and existing, under and by virtue of the laws

of the State of Ohio, and is a citizen and resident thereof, having its principal office in the city of Cincinnati, in said State, and that the defendant, W. J. Murray, is a citizen and resi-
(24) dent of the State of South Carolina, residing at Columbia, in said State; the defendant John McSween, is a citizen and resident of said State of South Carolina, residing at Timmonsville, in said State; the defendant, B. F. Arthur, is a citizen and a resident of the State of South Carolina, residing at Union, in said State; that the defendant, C. K. Henderson, is a citizen and resident of the State of South Carolina, residing at Aiken, in said State; and the defendant, Avery Patton is a citizen and resident of the State of South Carolina, residing at Greenville in said State.

II.

And your orator further shows that many years prior to the passage of the act hereinafter mentioned, there was duly created and established by law, in the State of South Carolina, an institution for the purpose of buying, selling and distributing alcoholic liquors within said State, known as the State Dispensary, and that by the terms of the law creating and establishing said Dispensary, the managing agents or officers thereof were duly authorized, directed and empowered to purchase in its name and on its behalf, all kinds of spirituous, vinous and malt liquors, and to pledge the credit of the said State Dispensary for the payment of the same.

III.

And your orator further shows that the General Assembly of the State of South Carolina, at its session held in the year 1907, for the purpose of discontinuing said State Dispensary, disposing of its assets and paying off its creditors, passed an act entitled "An Act to Provide for the Disposition of all Property Connected with the State Dispensary and to Wind up its Affairs," which said act is in words and figures as follows:

"Session Laws, S. C., 1907.

"No. 402.

"An Act to provide for the disposition of all property con-
(25) nected with the State Dispensary, and to wind up its affairs.

"Sec. 1. Be it enacted by the General Assembly of the State of South Carolina that immediately upon the approval of

this act, the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

"Sec. 2. Said Commission shall immediately organize by the election of a Chairman and a Secretary from their number.

"Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, that no alcoholic liquors or beers shall be disposed of within the State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations, from whom purchased, and for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants and stenographers, and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts con-
(26) nected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State; *Provided, further*, that all payments shall be made in gold and silver coin of the United States, in United States Currency or in national bank notes.

"Sec. 4. The compensation of each member of said Commission shall be $5.00 per day for each day actually employed about the business and actual expenses for the time engaged. *Provided*, that they shall receive no compensation for services rendered on this Commission after January 1st, 1908.

"Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

"Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and

employes as they may deem necessary, and to contract with them at the time of employment for their compensation.

"Sec. 7. The said Commission shall submit to the Governor at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

"Sec. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary,as prescribed by an Act to Provide for the Investigation (27) of the Dispensary, approved January 24th, A. D., 1906, be and hereby is, conferred upon the Commission provided for under this Act; provided, that for purpose of the investigation of the affairs of the Dispensary as herein provided, each and every members of said Commission be and hereby is, authroized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

"Approved, the 16th day of February, A. D., 1907."

IV.

That the said Act was duly approved on the 16th day of February, 1907, and within a short time thereafter the Commission therein provided for was created by the appointment of the defendants, as Commissioners, and said defendants, having duly qualified and organized pursuant to said Act, became, and do now constitute, the State Dispensary Commission, and as such are charged with the execution of all the powers conferred and the performance of all the duties imposed upon said Commission by the said Act.

V.

That, immediately upon their qualification and organization as hereinbefore alleged, the defendants entered upon the discharge of said duties, and in accordance with the directions contained in said Act, took possession and control of the entire business and property of the State Dispensary, and have, as your orator is informed and believes, sold said property and collected the debts due to said State Dispensary and the proceeds arising from said sale and collection are, or ought to be, in the

hands of said defendants, applicable to the payment of the liabilities of said State Dispensary, and to the other uses and purposes designated in said Act.

VI.

And your orator further shows that, prior to the passage of the said Act of 1907, providing for a sale of the property of the (28) said State Dispensary and the winding up of its affairs, and while the said State Dispensary was still engaged in business, your orator sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable whiskies and other spirituous liquors, all of which whiskies and liquors were received and accepted by said State Dispensary, and had been, except as hereinafter alleged, sold or disposed of by it at a substantial profit; that the sales so made by your orator were, in every respect, regular and legal and were made upon orders properly and lawfully given by the persons duly authorized to give such orders; and the whiskies were delivered to said State Dispensary under a contract, promise and agreement that your orator should be paid the prices charged therefor, and the said State Dispensary became and was at the time of the passage of said Act, and at the time the defendants took charge of said business and property, and still is, justly indebted to your orator for the same.

VII.

That, within a short time after the appointment and qualification of the defendants and their organization as the State Dispensary Commission, your orator being desirous of having its account against the State Dispensary settled, and in order that all differences might be reconciled, or disputes, if any, adjusted, and the amount due to your orator fixed and determined, filed with said defendants an itemized statement of its account and requested the defendants to have the same audited so that it could be passed upon; that, thereafter, the defendants notified your orator that there was still on hand and undisposed of a portion of the whiskey which your orator had sold to the said State Dispensary and asked your orator to take back said whiskey and allow a credit therefor, then and there holding out as an inducement to your orator for so doing, that if they were permitted to return said goods, it would greatly facilitate a settlement with your orator and enable them to make a much earlier payment of the account, and your orator, being anxious to remove every possible cause of delay in obtaining a settlement

(29) of its claim, did take back all of said goods and give credit therefor at the invoice price thereof.

VIII.

That, on or about the 24th day of May, 1907, the defendants advised your orator that, in comparing its account with the books kept by the State Dispensary, they had discovered a discrepancy between the amount claimed by your orator and the amount shown by said books to be due, of $292.14, growing out of certain credits to which the said State Dispensary was entitled, and which your orator had failed to allow, but that, in every other particular, your orator's account was, according to the audit made by the defendants, correct, and corresponded with the said books, and that if your orator would allow said credit there would be no further dispute as to the amount due to your orator, and your orator being still anxious to get its account adjusted and receive payment of the same, did consent that said sum might be deducted, and, thereupon, it was agreed between your orator and the defendants, that there was, on the date above mentioned, a balance of $66,501.19 justly due and owing to your orator by the said State Dispensary, which said sum the defendants then and there agreed to pay, but, notwithstanding your orator has made frequent demands on them, they have refused and still refuse to pay the same.

IX.

And your orator further shows that, as it is informed and believes, the defendants have received from the sale of the property of the State Dispensary and the collection of debts due it, and now have in their hands a large sum of money, amounting to upwards of $800,000.00, and that this sum, if properly preserved and applied, will be amply sufficient to pay off and discharge the claim of your orator and all other just liabilities of said State Dispensary, which said liabilities do not, as your orator is informed and believes, exceed the sum of $609,000.00, all of which facts will more fully appear from the report made (30) by the defendants to the Governor of the State of South Carolina, on or about the 4th day of January, 1908, to which report reference is hereby made for the ascertainment of said amounts.

X.

That, as your orator is advised and believes, the money received by the defendants and held by them as hereinbefore alleged, having been placed in their possession for the specific

purpose of paying all the just liabilities of the State Dispensary, became and now constitutes a trust fund in the hands of said defendants, and the said defendants hold the same as trustees for your orator and the other creditors of the said State Dispensary, and the amount due your orator having been determined and agreed upon, your orator is entitled to have said amount immediately paid to it out of said fund.

XI.

And your orator further shows that said defendants are abusing the trusts reposed in them by wrongfully and unlawfully failing and refusing to carry out the terms and provisions of said Act of 1907 of the General Assembly of the State of South Carolina and that the greater part of the money which the defendants have received, as aforesaid, has been on deposit for many months, and is now on deposit in certain banks in the State of South Carolina, in which banks the said defendants, or some of them, are respectively interested, either as officers, stockholders or directors; that a large sum of said money is now in the National Loan & Exchange Bank of Columbia, in which bank the defendant Murray, who is the Chairman of the Dispensary Commission, is a large stockholder and a director; that another large portion of said money is deposited in the Bank of Timmonsville, in which said bank the defendant McSween is a stockholder and a director, and is also its president; that another large portion of said money is on deposit in the People's Bank of Union, in which bank the defendants Arthur is a stockholder and a director, and also its president; that another large (31) portion of said money is on deposit in the Bank of Aiken, in which bank the defendant Henderson is a stockholder and director; that another portion of said money is deposited in the Piedmont Savings & Investment Co. of Greenville, in which the defendant Patton is a stockholder and director, and a portion of said money is deposited in the Merchants & Farmers Bank of Cheraw, in which bank one W. F. Stevenson, who resides in the said town of Cheraw, and who is the attorney for the defendants constituting the State Dispensary Commission, is a stockholder and director, and also its president.

That the said defendants have wrongfully, unlawfully and fraudulently declined and refused to make distribution of the said money among the creditors of said State Dispensary or to pay the claim of your orator, or any of the other of said creditors, for the reason, as your orator verily believes and alleges the fact to be, that there has been formed and now exists an unlawful understanding or agreement between the defendants, by which it has been decided that the money deposited in the

banks above named shall be held and allowed to remain as long as possible in said banks and be used by them for their own benefit and profit.

XII.

And your orator further shows that there are a large number of persons claiming to be creditors of the said State Dispensary and seeking to collect from the defendants various sums ranging in amount from one to many thousand dollars; that some of said persons, for the purpose of compelling the payment of their debts, have already brought suit against said defendants, and others are, as your orator is informed and believes, threatening to institute similar actions; and if the defendants shall be required or permitted to defend a multiplicity of such suits in order to determine the validity of each claim against them, and shall be allowed, as they have declared their intention to do, to defer the payment of all claims until the final termination of said suits, a large part of the funds in their hands will be wasted in expensive litigation and court costs, and a great wrong, injury and injustice will be done to your (32) orator and the other creditors whose claims are admitted to be just and correct, and about which there is and can be no dispute.

XIII.

And your orator further shows that, although the said defendants have in their hands the large sum of money hereinbefore mentioned, and although they are wrongfully and unlawfully retaining said money for the use and benefit of institutions in which they are personally interested, and are wrongfully and unlawfully refusing to carry out and perform the duties and trusts imposed upon them by the General Assembly of the State of South Carolina, the said defendants have only given bonds in the sum of $10,000.00 each, and they are now, as your orator is informed and believes, threatening to take measures to have an act passed by the General Assembly of South Carolina terminating their Commission and providing for a transfer of the money in their hands to the State Treasurer, which money ought to be applied to the payment of the debts due to your orator and the other creditors of the said State Dispensary, and thus, if possible, place the same beyond the reach, or by some other means, impair the contract rights of your orator and said other creditors, and, as your orator is advised and believes, unless the defendants are restrained and enjoined from exercising any control over or in any way interfering further with said fund, the said defendants will waste

or wrongfully divert the same to the great and irreparable damage of your orator and all the other creditors of the State Dispensary.

XIV.

And your orator further shows, upon information and belief, that there is a very wide difference between the opinions of the defendants as to the duties required of them as members of the Dispensary Commission, and the proper manner of performing said duties; that the defendant B. F. Arthur, although still a member of said Commission has declined and refused to take any further part in the proceedings thereof, and has not, (33) for at least eight months, attended any of the meetings of said Commission, or participated in any of its deliberations; that the other four defendants as members of said Commission are about equally divided as to what course ought to be pursued with reference to the ascertainment of the just liabilities of the State Dispensary and the payment of the same, and that, by reason of such division, the said defendants have become engaged in a dispute among themselves, which renders it almost impossible for them ever to agree upon any plan by which to carry out the provisions of the Act of 1907 of the General Assembly of South Carolina and to execute the trust imposed upon them by said Act, and, as your orator is advised and believes, unless this Honorable Court shall take charge of the trust fund now in the hands of the defendants as members of said Commission, and administer the same in accordance with the provisions of the said Act of 1907, your orator and the other creditors of said State Dispensary, will, to their great and irreparable damage, be indefinitely delayed in the collection of their claims.

XV.

And your orator further shows, upon information and belief, that the defendants now allege and pretend that there were certain irregularities and fraud in connection with some of the sales of liquors made to the former officers of the State Dispensary, and the defendants have entered into an unlawful combination or conspiracy with one J. Fraser Lyon, the present Attorney General of the State of South Carolina, and under whose advice said defendants are acting, to aid the said Lyon in carrying out his frequent threats to prosecute and imprison said officers, and to that end, have agreed among themselves and with said Lyon to withhold the payment of the claim of your orator and all other creditors, until the said Lyon has obtained such evidence as may be sufficient to prove the guilt and se-

cure the conviction of said officers; that under and pursuant to this agreement, combination or conspiracy the defendants have refused and are still refusing to carry out the provisions of the Act of 1907, and to pay the claim of your orator and the other just liabilities of said State Dispensary, although the account of your orator has been duly audited, the amount claimed admitted to be justly due and payable, as hereinbefore alleged, and notwithstanding the fact that the defendants have never made any pretense or claim that either of the sales made by your orator was, in any respect, irregular, illegal or fraudulent, and notwithstanding the frequent promises and agreements by the defendants to pay the amount so admitted to be due.
(34)

XVI.

And your orator further shows that, notwithstanding the fact that the amount claimed by your orator has been admitted by the defendants to be a just liability against the said State Dispensary, and now due and payable out of the fund in their hands and although the said defendants have never claimed or pretended that said amount was subject to any off-sets, credits or counter claims, your orator is ready, able and willing, if this honorable court shall direct that the amount due to it be immediately paid, to execute and deliver to the said defendants a good and sufficient bond in such sum as may be required by this honorable court, to the full amount of its claim, if necessary, conditioned to pay to the said defendants all such amounts as may be, upon the hearing of this cause, found and adjudged to be due by your orator to these defendants by way of off-set, reduction, credit, counter-claim or otherwise.

In consideration whereof, and for as much as your orator is without remedy and can obtain adequate relief only in a court of equity, and to the end that the defendants may be prevented from committing further wrongs and trespasses against the rights of your orator, and for the purpose of preserving the funds in the hands of the defendants and of enforcing the rights and equities of your orator in and to the same, and preventing further waste, loss and damage, by reason of the facts alleged in this bill, your orator prays:

(1) That this Honorable Court will either forthwith appoint a receiver to take charge of and administer as a trust
(35) fund all the money now in the hands of the defendants arising out of the sale of property belonging to the State Dispensary of South Carolina or from the collection of debts due it; or direct and decree that the amount admitted to be due to your orator be immediately paid to it upon the execution by

your orator of a good and sufficient bond to be approved by the court and conditioned to pay to the defendants all such sum or sums as may be found to be due them by your orator and adjudged to be paid by it.

(2) That the defendants, their agents, servants, attorneys and employes be restrained and enjoined from disposing of or paying out, or in any manner interfering further with said fund or any part thereof, except to transfer the same to the receiver appointed by the court, or to pay the amount due to your orator as the court may direct.

(3) That it be referred to a master to ascertain and determine the amount due to your orator for goods sold and delivered by it to the said State Dispensary, and that a decree be entered ordering and directing that the amount so found to be due be immediately paid to your orator. That the defendants be required to set forth an account of all and every sum or sums of money received by them, or either of them, or which ought to have been received by them, or which has been received by any person or persons, by their or either of their orders, or for their or either of their use, from the sale of any property of the said State Dispensary or the collection of and debt or debts due to it, and when and from whom, and from what in particular, all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

And that your orator have such other and further relief in the premises, as the nature of the circumstances of this case may require, and as to the court may seem meet and proper;

And, may it please your Honors to grant unto your orator a writ of injunction, conformable to the prayer of this bill, and also a writ of subpœna directed to the said defendants, (36) commanding them, and each of them, to appear and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and to stand to, perform and abide by such orders, directions and decrees in the premises as to the court shall seem meet or be required by the principles of equity and good conscience.

(Signed) THE FLEISHMANN CO.
By CASPER H. ROWE.

MERRICK & BARNARD,
GEO. B. LESTER,
Solicitors for Complainant.

STATE OF NORTH CAROLINA,
County of Buncombe.

(37) On this the 20th day of January, 1908, before me personally appeared Casper H. Rowe, who, being first duly sworn, says: That he is an officer of the complainant corporation, The Fleishmann Company, to-wit, its treasurer, and makes this affidavit in its behalf; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true.

(Signed) CASPER H. ROWE.

Sworn to and subscribed before me, this the 20th day of January, 1908.

(Signed) PHILIP R. MOALE,
Notary Public.

My commission expires September 11, 1909.

Sub. Ad Re.

(38) Filed 23rd January, 1908.

UNITED STATES OF AMERICA,
Fourth Circuit,
District of South Carolina.

The President of the United States of America to W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, and The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Company, all of Columbia, South Carolina, The Bank of Timmonsville, of Timmonsville, South Carolina, The People's Bank of Union, South Carolina, The Bank of Aiken, South Carolina, The Piedmont Savings and Investment Company, of Greenville, South Carolina, The Merchants and Farmers Bank of Cheraw, South Carolina, and The Bank of Camden, South Carolina.

You are hereby strictly commanded and firmly enjoined that all manner of excuses being laid aside you be and appear before the Judges of the Circuit Court of the United States for the District of South Carolina, at Charleston, on the Rules

day of March, 1908, twenty days after the service thereof; then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of The Fleischmann Company.

And also, that you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the Registry of said court, your plea, answer or demurrer, to the said bill of complaint.

Herein fail not, under the pain of one hundred pounds.

Given under the seal of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America at Charleston, in South (39) Carolina District, aforesaid, the 23d day of January, in the year of our Lord one thousand nine hundred and eight, and in the one hundred and thirty-second year of the Sovereignty and Independence of the United States of America.

MERRICK & BARNARD,
GEO. B. LESTER,
Complainant's Solicitor.

Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit, in the Clerk's Office of the Circuit Court of the United States for the District of South Carolina, on or before the first Monday of March, 1908, otherwise the bill will be taken *pro confesso* against them.

[Seal]

C. J. MURPHY,
C. C. C. U. S., Dist. of S. C.

Order to Show Cause.

Filed Jan. 23, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleishmann Company, Complainant,
vs.
W. J. Murray and others, Defendants.

(40)

Upon considering the bill of complaint filed in this cause, it is now, on motion of the solicitors for the complainant, or-

dered and adjudged that the defendants be and appear before the undersigned Judge, at his Chambers, in Asheville, North Carolina, at 10 o'clock a. m., on the 29th day of January, 1908, and show cause, if any they have, why the relief prayed for in said bill shall not be granted, and why a receiver shall not be appointed by this court to take charge of and administer all of the funds now in the hands of the said defendants, arising from the sale of property belonging to the State Dispensary, or from the collection of any debts due to it.

Let a copy of this order, together with a copy of the bill, be served forthwith upon each of the defendants.

This the 21st day of January, 1908.

(Signed) J. C. PRITCHARD,
United States Circuit Judge.

Affidavit of George B. Lester.

(41) Filed Jan. 23, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleishmann Company, Complainant, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

Affidavit of George B. Lester.

George B. Lester, being first duly sworn, says:

That he is general counsel for the complainant above named, and also a member of a special committee appointed by certain creditors of the South Carolina State Dispensary, for the purpose of obtaining an adjustment and settlement of their claims against the defendants; that as such general counsel for the complainant and member of said committee, affiant has spent much time in the city of Columbia, where the defendants, constituting the Dispensary Commission, hold their sessions;

that during affiant's visits to Columbia, he has had frequent conversations with numerous persons, business men and citizens of Columbia, who are familiar with the affairs of the State Dispensary and well acquainted with the defendants, or some of them; that in a large number of these conversations, affiant was informed, and it was the prevailing opinion among those acquainted with Dispensary matters, that the next session of the General Assembly of the State of South Carolina would take some steps or would pass some act looking to an abolition of the Dispensary Commission and the disposition of the funds (42) in the hands of the defendants. Affiant was also informed by one of the officials connected with the defendants constituting the State Dispensary Commission that legislation would be asked for in the form of a bill providing for the abolition of the Dispensary Commission and the establishment of a Court of Claims to pass upon and determine the amounts due to the various creditors of the State Dispensary, and for a transfer of the funds now in the hands of the Commission to the State Treasurer.

Affiant further states that the General Assembly of the State of South Carolina is now in session, and that, from information which has come to affiant's knowledge since the filing of the bill and the issuing of the order to show cause in this suit, he has reason to believe and does verily believe that some attempt will be made to have the said General Assembly pass some bill, the object of which is to remove the funds now in the hands of the defendants beyond the jurisdiction of this court, and that, on January 21st, 1908, there appeared an article in "The State," a newspaper of wide circulation and influence in the city of Columbia, in which article it was suggested that such action could be easily taken; that the defendants and their counsel are contending that the money now in the hands of the defendants constituting the Dispensary Commission is a State fund, and, as such, the present General Assembly has entire control over the same, and that any suit brought by any creditor of the State Dispensary, seeking to enforce any claim against said fund is a suit against the State; and affiant verily believes and alleges the fact to be, that it is the object and purpose of the defendants to avoid, if possible, the payment of the claim of the complainant, and all other creditors, and that, in view of the application which has been made to the court for the appointment of a receiver to take charge of said fund, it is the purpose of the said defendants, or their attorneys, or representatives, to thwart the action of the plaintiff by taking some immediate steps to put this money beyond the reach of this court and thus deprive the complainant of any relief in this suit.

Affiant further states, on information and belief, that, in addition to the amounts deposited in the banks mentioned in (43) complainant's bill of complaint, to-wit, the National Loan & Exchange Bank of Columbia, The Bank of Timmonsville, The People's Bank of Union, The Bank of Aiken, The Piedmont Savings & Investment Company of Greenville, The Merchants & Farmers Bank of Cheraw, some portion of said funds is held by the Palmetto National Bank of Columbia, The Columbia Savings Bank & Trust Company and The Bank of Camden.

And affiant further shows that, under the former order to show cause entered in this case, complainant has no protection against a dissipation or a diversion of the funds in the hands of the defendants, or in the depositaies above named, other than a writ of injunction heretofore granted by this court in the case of Wilson Distilling Company against said defendants, in which case the complainant in this case has no interest or right to be heard, and if the said injunction should be, either by consent of parties, or otherwise, dissolved, said defendants, as affiant verily believes, would at once take steps to place the funds under their control beyond the reach of this court, either by securing an act of the legislature, as above suggested, or by some other means, and, as affiant is advised and believes, for the reasons set forth in this affidavit and the complainant's bill, the complainant is entitled to and ought to be allowed an order restraining said defendants and the depositaries in which said defendants have placed the funds under their control, from in any way paying out any of said funds, removing same beyond the jurisdiction of this court, or taking any action tending to or which might prevent the complainant from obtaining the full relief to which it is entitled in this cause.

Wherefore, affiant prays that the depositaries above named be made parties to this cause and the order heretofore made, be so amended as to restrain and enjoin said defendants and said depositaries from interfering with, paying out, transferring, or in any wise changing the present status of said funds, until the further orders of this court.

(Signed) GEO. B. LESTER.

Sworn to and subscribed before me, this 22d day of January, 1908.

(Signed) W. SCOTT RADEKER,
Notary Public.
(My commission expires November 14, 1909.)

Restraining Order.

(44) Filed Jan. 23, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleishmann Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

It having been made to appear to the court, since the signing of the order to show cause, heretofore granted in this case, that there is reasonable ground to apprehend that the defendants may, before the return day of said order, make some attempt to place the funds now in their hands and for which a receiver has been asked, beyond the jurisdiction of this court, and that it is necessary, in order to secure the complainant's rights, that said funds shall remain in *statu quo;*

It is now, on motion of solicitors for the complainant, ordered and adjudged, that the defendants and each of them, their agents, servants, attorneys and employes, and the following named depositaries, to-wit: The National Loan & Exchange Bank, The Palmetto National Bank, The Columbia Savings & Trust Company, all of Columbia, South Carolina, The Bank of Timmonsville, of Timmonsville, South Carolina, The People's Bank of Union, South Carolina, The Bank of Aiken, South Carolina, The Piedmont Savings & Investment Company, of Greenville, South Carolina, The Merchants & Farmers Bank of Cheraw, South Carolina, and the Bank of Camden, South Carolina, be and they are hereby made parties defendant to this cause and that they and all other banks or depositaries, if any, in which (45) said funds, or any part thereof, is now deposited, their officers, agents, servants, attorneys, and employes, be, and they are, each hereby restrained and enjoined from interfering with, paying out or transferring to any person or persons whomsoever, or in any way disturbing or changing the present status of said funds, or any part thereof, and from taking any steps with reference to the said funds tending to, or which may put said

funds beyond the jurisdiction of this court until the further orders of this court.

This January 22d, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(46) I hereby certify and return that I served the annexed bill of complaint, affidavit & orders on the therein-named W. J. Murray, by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district on the 23 day of Jany., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(47) I hereby certify and return that I served the annexed subpœna ad re on the therein-named W. J. Murray by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 25 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(48) I hereby certify and return that I served the annexed bill in equity, two orders & sub. ad. re on the therein-named John McSween by handing to and leaving a true and correct

copy thereof with him personally at Timmonsville, in said district, on the 27th day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(49) I hereby certify and return that I served the annexed order on the therein-named B. F. Arthur by handing to and leaving a true and correct copy thereof with him personally at Union, in said district, on the 25 day of Jany., A. D., 1908.

_____,
U. S. Marshal.
By V. P. CLAYTON, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(50) I hereby certify and return that I served the annexed complaint, orders & sub. ad re on the therein-named C. K. Henderson by handing to and leaving a true and correct copy thereof with F. P. Henderson, a son of the said C. K. Henderson, & who had charge of his business, personally at Aiken, in said district, on the 27 day of Jany., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By M. W. HUDGENS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(51) I hereby certify and return that I served the annexed complaint, orders & sub. ad re on the therein-named Avery Pat-

ton by handing to and leaving a true and correct copy thereof with him personally at Greenville, in said district, on the 25 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(52) I hereby certify and return that I served the annexed subpœna ad re on the therein-named G. M. Berry, cashier National Loan & Exchange Bank by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 25 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(53) I hereby certify and return that I served the annexed bill of complaint, affidavit, orders on the therein-named E. C. Catheart, Jr., Asst. Cashier The National Loan & E. & C. Bank, by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 23 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(54) I hereby certify and return that I served the annexed bill of complaint, affidavit, orders on the therein-named Wilie

Jones, president Palmetto National Bank, by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 23 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(55) I hereby certify and return that I served the annexed subpœna ad re on the therein-named Wilie Jones, president Palmetto National Bank, by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 25 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(56) I hereby certify and return that I served the annexed bill of complaint, affidavit & orders on the therein-named A. R. Heyward, Jr., cashier, Savings Bank & Trust Co., by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 23 day of Jany., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(57) I hereby certify and return that I served the annexed subpœna ad re on the therein-named D. C. Heyward, president

Cola. Savings & Trust Co., by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 25 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(58) I hereby certify and return that I served the annexed bill in equity, two orders and sub. ad re on the therein-named The Bank of Timmonsville by handing to and leaving a true and correct copy thereof with John McSween, president of said bank, personally at Timmonsville, in said district, on the 27 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of ..... } *ss:*

(59) I hereby certify and return that I served the annexed ..... on the therein-named The Peoples Bank of Union, by handing to and leaving a true and correct copy thereof with B. F. Arthur, Prest., personally at Union, in said district, on the 25 day of Jany., A. D., 1908.

_____,
U. S. Marshal.
By V. P. CLAYTON, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(60) I hereby certify and return that I served the annexed complaint, orders & sub. ad re on the therein-named The Bank

of Aiken by handing to and leaving a true and correct copy thereof with William Wesley Muckenfuss, the cashier of the Bank of Aiken, personally at Aiken, S. C., in said district, on the 27 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By W. M. HUDGENS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(61) I hereby certify and return that I served the annexed complaint, orders & sub. ad re on the therein-named The Bank of Aiken by handing to and leaving a true and correct copy thereof with Wm. Wesley Muckenfuss, the cashier of the Bank of Aiken, personally at Aiken, S. C., in said district, on the 27th day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By M. W. HUDGENS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(62) I hereby certify and return that I served the annexed complaint, orders & sub. ad re on the therein-named Piedmont Savings & Investment Co. by handing to and leaving a true and correct copy thereof with F. F. Capers, president, personally at Greenville, in said district, on the 26 day of Jany., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(63) I hereby certify and return that I served the annexed sub. ad re complaint & orders on the therein-named The Mer-

chants & Farmers Bank by handing to and leaving a true and correct copy thereof with T. G. Matherson, cashier of the bank, personally at Cheraw, S. C., in said district, on the 28th day of Jany., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By P. P. MEEKINS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of ..... } *ss:*

(64) I hereby certify and return that I served the annexed bill in equity, orders & sub. ad re on the therein-named H. G. Carrison, president The Bank of Camden, S. C., by handing to and leaving a true and correct copy thereof with his daughter, Miss Emily Carrison, at his residence personally at Camden, S. C., in said district, on the 27th day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(65) I hereby certify and return that I served the annexed bill in equity, orders & sub. ad. re. on the therein-named H. G. Carrison, president the Bank of Camden, S. C., by handing to and leaving a true and correct copy thereof with his daughter, Miss Emily Carrison, at his residence personally, at Camden, S. C., in said district, on the 27 day of January, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Order Modifying Order of Injunction.

(66) Filed Feby. 3rd, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Fleischmann & Company, Complainants,
vs.
South Carolina Dispensary Commission et al., Defendants. } Order.

It is ordered, that the injunction heretofore granted in this case be so modified that the Commission may be authorized, pending the decision of the motion that is before the court, to proceed to pay such expenses as are necessary to be incurred in the administration of the funds and business in their hands and the protection of the rights which they have under the statute creating them, and for such purposes and none other; Provided, that the sum herein authorized to be expended shall not exceed the sum of $15,000.

The clerk will enter and certify a copy of this order to the Commission.

J. C. PRITCHARD,
Jan. 30th, 1908. U. S. Circuit Judge.

Return of Defendants.

(67) Filed January 29th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

The Fleischmann Company, Complainants,
vs.
W. J. Murray et al., constituting the State Dispensary Commission of South Carolina, and W. J. Murray, et al., individually, Defendants. } In Equity.

Come now W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, and without submitting themselves to the jurisdiction

of this Honorable Court, but, on the contrary, insisting that it is without jurisdiction in the premises, and reserving the right to demur, plea or answer in accordance with the rules of practice and procedure which obtain in this court, and solely in response, and by way of a return to the rule to show cause granted on the 21st day of January, 1908, "why the relief prayed for in the said bill should not be granted and why a receiver should not be appointed by this court to take charge of and administer all of the funds now in the hands of said defendants arising from the sale of property belonging to the State Dispensary or from the collection of any debts due it," and for cause in this behalf these defendants say:

1.

That the said plaintiff has not by and in said bill stated such a cause as doth or ought to entitle it to any such relief as is thereby sought or prayed for from or against these defendants, or either of them.

2.

(68) That it appears from the allegations contained in the complainant's bill that the said suit is a suit, in fact and in legal effect, against the State of South Carolina and not against these defendants or either of them, except as in their official capacity they represent said State, and therefore is contrary to the provisions of the eleventh amendment to the Constitution of the United States of America.

3.

That it appears from the allegations in said bill that the said suit is a suit against the State of South Carolina for that the purpose and intention thereof is to administer the funds and moneys belonging to the State of South Carolina and in the custody of its duly authorized agents; to coerce the State of South Carolina in the payment of the alleged debt of the plaintiff; and to restrain a duly constituted court of the State in violation of section 720 of the revised statutes.

4.

These defendants deny the allegations in paragraph 2 of the bill of complaint and they aver that "The manufacture, sale, barter and exchange of intoxicating liquors was prohibited, and the State of South Carolina in the exercise of her police

power engaged in and monopolized the liquor traffic, and to that end appointed and established the State Dispensary and appropriated $50,000,00, for commencing said business.

Said Dispensary, however, had no existence or entity or credit separate and apart from the said State. It was a mere agency of the State for the conduct and operation of her business. The business belonged to the State. All purchases therefor were made by the State and upon her credit. All profits of the business and the stock on hand at the time the State Dispensary was abolished, belonged to the State.

5.

(69) Under the Act creating the State Dispensary Commission and in the exercise of the powers, rights and the duties conferred upon said Commission and these defendants by said Act, and by the Act approved January 24th, 1906, these defendants closed out the entire business and property of the State Dispensary, except real estate, and collected a large part of the debts, and thus the fund in controversy was realized.

6.

These defendants deny the averments contained in paragraph 10 of the bill of complaint and say that said funds are not trust funds, and that these defendants do not hold or control the same, as trustees, either for the complainant or other alleged creditors of the State, or for any one else. They aver that said funds are in their custody or control as officers of the State and at the will of the State, and are to be disposed of in accordance with the provisions of the Act creating the Commission, unless said Act is amended or repealed. They further aver that the said funds are the property of the State of South Carolina and are in the possession of the said State, as the control or possession of the said funds are in the defendants as the officers of the State, and their possession or control is the possession or control of the State.

7.

They further aver that they, as individuals, have no interest whatever in the litigation or in the funds in controversy, and that their sole duty and liability with respect to said funds, is to the State of South Carolina, to her General Assembly and Governor. That the claim of the plaintiff and all others for goods sold to the State Dispensary are against the State, and not

against the State Dispensary or against the State Dispensary Commission, or against these defendants, either in their official or individual capacity. Neither the State Dispensary Commission, or these defendants, as officers or individuals, sustain any relation or privity to the plaintiff, contractural or other-
(70) wise. They owe no duty to, and are under no liability to the plaintiff or to any other person holding claims of like character against the State.

8.

These defendants further say that they have exercised the powers and authority granted by the General Assembly only for the purpose of enabling them to perform their duties fairly and promptly, and they submit that they have proceeded with the work with all possible expedition and dispatch.

They requested the Attorney General and his associates to investigate and secure evidence as to the validity and justice of the various claims against the State. From time to time they impressed upon said parties their desire to complete the work as soon as possible, and repeatedly urged the necessity of prompt action. It was until within the last thirty days, however, that said parties reported that they had secured sufficient evidence, and were ready to proceed with the hearing of all said claims.

These defendants say upon information and belief that this report was made as early as practicable, as there was a large number of claims extending over a period of several years, and the evidence relative to the same was gathered from various States.

Immediately upon receipt of this report, the commission assigned 41 of said claims for a hearing, and among these was plaintiff's claim. A docket was made up, copy of which will be shown to the court, and a notice was served upon the plaintiff and upon all others whose claims had been assigned for a hearing as stated. A formal notice was served upon the plaintiff, requiring it to produce certain of its books of original entry relating to its accounts against the State.

9.

On the 14th day of January, the Commission commenced the hearing of said claims. It took up the claims of Ullman & Co. and of the Anchor Distilling Company. After hearing of evidence the Commission reached the conclusion that instead of the State being indebted to said claimant in the sum of $36,-926.78, that Ullman & Co. was indebted to the State in the sum

of $31,390.72 and thereupon they returned a judgment in favor (71) of the State against Ullman & Co. in accordance with their findings. A transcript of the evidence in said case, and the copy of the judgment of the Commission will be exhibited to the court.

10.

Plaintiff's claim was assigned for January 23rd. George B. Lester, Esq., general counsel for plaintiff was present on January 14th and claimed an agreement with Mr. Stevenson that plaintiff's case would be heard that day. Before announcing ready to proceed, the counsel for the State demanded the production of the books covered by the notice served upon the plaintiff as aforesaid, and notified Mr. Lester that they desired the presence of one Early who acted for the plaintiff in connection with sales to the State and whom they desired to examine in connection with its claim. Thereupon the said George B. Lester stated that the plaintiff would decline to produce its books or have said Early present. He challenged the jurisdiction of the Commission to enter upon a full investigation of all transactions between the plaintiff and the officials of the State Dispensary, and stated that he would appeal to the Federal Court for relief.

11.

The Commission is advised by the Attorney General and his associates that the claim of the plaintiff for goods sold by it to the State Dispensary is unjust and invalid and they have evidence to establish (a) That the plaintiff and the Gerson-Seligman Company are one and the same, as the latter is a mere trade name under which the former transacted business and was used for the purpose of avoiding the provision of the statute which prohibits any person, firm or corporation from submitting more than one bid.

(b) That there existed between the plaintiff and Gerson-Seligman Company and its agents and representatives and a majority of the said members of the Board of the South Carolina Dispensary a conspiracy to defraud and cheat the State of (72) South Carolina and in pursuance thereof, the said plaintiff by and with the aid and assistance of the said Board of Directors, or a majority thereof, did cheat and defraud said State of South Carolina by charging and collecting from said State prices for the goods sold to the State which were largely in excess of the market value thereof, which overcharges were by agreement between conspirators made and used for the purpose of corrupting and bribing the officials and agents of said State

of South Carolina to the end that the Board of Directors of the Dispensary might be induced to purchase the goods of said plaintiff at such excess prices and the difference between the fair market value of the goods so sold by said plaintiff to the said State and the prices at which said goods were so purchased from the plaintiff was fraudulently, and unlawfully employed by the plaintiff in bribing and corrupting the officials and agents of the said State, so that said State was cheated and defrauded out of a large sum of money in excess of the amount now claimed to be due by the plaintiff.

(c) That the plaintiff did not comply with the law of the State of South Carolina relative to the sale and purchase by the State Board of Directors in that they failed to comply with the provisions of said law requiring that only one bid shall be made by any one for said plaintiff and the said Gerson-Seligman Company, being in fact one and the same firm, did fraudulently and deceitfully pretend that they were separate firms and did frequently make two or more bids at the same time to the Treasurer of said State for consideration by the State Board of Directors of the South Carolina Dispensary.

(d) They failed to accompany their bids, or all of them, with the chemical analysis of the liquor offered for same.

(e) They failed to furnish the bonds required by law to insure the compliance by them with the terms of the contract of purchase and sale between them and the State Dispensary.

(f) That they violated said law in that they constantly had agents, representatives and solicitors in the State for the purpose of soliciting the purchase of their goods by said State, and that through its said agents and representatives soliciting (73) business from said Board of Directors.

(g) That the gross amount of sales made by the plaintiff and by said Gerson-Seligman Company to the State amounted in the aggregate to several hundred thousand dollars, and that in each of the said bills there were prices charged in pursuance of said conspiracy in excess of said fair market value.

(h) That the plaintiff sold to the State the same brand of liquors of a lower proof, at a price higher than it sold the same brand of goods of a higher proof to other parties.

(i) That the plaintiff sold to the State as whiskey an artificial whiskey or concoction made of spirits with a trace of whiskey added to it.

(j) That in pursuance of said conspiracy the advertisements for bids were illegal in that the prices of the liquors to be furnished were fixed in the advertisements and thus competition was prevented.

(k) That upon a just accounting between the State and the plaintiff, the plaintiff will be indebted to the State in a considerable amount.

12.

From the evidence already before the Commission, it is satisfied of the existence of a conspiracy to which some of the creditors and some of the Board of Directors were parties, but whether the plaintiff was a party thereto and whether its claims is valid or invalid, and whether it should be paid in whole or in part, are matters to be determined, as these defendants are advised after the Commission has heard the evidence of both plaintiff and the State.

13.

These defendants deny each and every allegation in the bill of complaint to the effect that these defendants had stated "That there would be no further dispute as to the amount due" plaintiff, or that these defendants had admitted that there was due the plaintiff a balance of $66,501.19, or any other amount, or that they had agreed to pay plaintiff any amount whatever, or that "the amount due (plaintiff) had been determined and agreed upon," or "that the amount claimed by (plaintiff) has been admitted by the defendants to be a just liability against the (74) State Dispensary and now due and payable out of the fund in their hands," or that "the said defendants have never claimed or pretended that said amount was subject to any offsets, credits or counter-claims." Each and every of said averments are untrue.

14.

Defendants deny the averment in said bill of complaint to the effect that plaintiff's account has been "adjusted," except to the extent that the books of the State Dispensary have been audited and the entries thereon have been brought into sub-

stantial agreement with the items of plaintiff's claim. There has been no determination or adjustment as to whether the items on said claim are proper and just charges against the State, nor whether the said claim is to be reduced in whole or in part by reason of offsets and counterclaims, nor whether said claim or any part thereof is illegal by reason of a non-compliance with the statutes of South Carolina, or by reason of frauds and conspiracies to which the claimant was a party, and in short for any of the reasons which the Attorney General and his associates contend they can establish by the evidence to which reference has been made. Moreover, defendants are advised that until final judgment all tentative conclusions or decisions however solemnly announced were subject to modification or reversal.

15.

These defendants denounce as gratuitously false the charges in said bill of complaint "that there has been formed and now exists an unlawful understanding or agreement between the defendants by which it has been decided that the money deposited in the banks above named shall be held and allowed to remain as long as possible in said banks, to be used by them for their own benefit and profit" and that the defendants "are wrongfully and unlawfully retaining said money for the use and benefit of the institution in which they are presonally interested and are wrongfully and unlawfully refusing to carry out and perform the duties in trust imposed upon them."

(75) The defendants aver that they deposited the funds received by them in thirty-one banks in the State of South Carolina, in which there is now on deposit to the credit of the State Dispensary Commission the aggregate sum of $706,599.82 on call and subject to check; that each and every of the said banks is sound and of undoubted solvency; that each and every of said deposits, with the exception of $16,505.59 on deposit with the National Loan & Exchange Bank as an active account draw interest from the date the deposits were respectively made at four per cent. per annum and are secured by State and municipal bonds and other solvent securities deposited by said banks with said Commission as collateral security for the payment of principal and interest of said respective deposits, the market value of which is largely in excess of the deposits secured thereby.

The defendants will exhibit to the court a list of the said banks with the amount deposited in each.

16.

That in addition to said amounts deposited and secured as aforesaid, the Commission will hereafter receive about $100,000.00 on account debts due by various County Dispensaries, which when received will in like manner be deposited and secured.

17.

The defendants admit that some of them are stockholders and directors in some of the banks named, but they submit that each of the said banks was selected solely because of its recognized solvency and their willingness to secure the deposits with sufficient and satisfactory collaterals and to pay four per cent. interest thereon.

18.

The Commission offered $150,000.00 to the Carolina National Bank and the Bank of Columbia, both of which refused to collaterally secure the deposit, and for that reason the deposits were not made with them.

The defendants are informed and believe that they could not have found banks, either in or out of the State of South (76) Carolina, in which to deposit said fund which would have received said deposits on safer or more favorable terms.

19.

The defendants deny the allegations in paragraph 14, and aver that there is no difference between the members of the Commission as to the method to be pursued in dealing with the creditors of the State for goods sold to the State Dispensary, and that the Commission as a body is a unit on the following propositions, to-wit: (1) to require all creditors whose claims are challenged by the counsel for the State to produce their books of original entry and their documents containing material evidence and to comply with all reasonable and proper requirements prescribed by the Commission. (2) To hear all competent evidence presented by the creditors or by counsel for the State, and after a careful and judicial consideration thereof, to determine what amounts are due by the State, and pay all claims which in their honest and impartial judgment are due by the State, and no others.

20.

The defendants deny that it has been eight months since Commissioner Arthur has met with the Commission. It is

true that he has not attended the meetings of said Commission since November. His physician wrote the Commission that Mr. Arthur's absence from one or more of the meetings was because of his illness.

21.

These defendants deny the allegations contained in paragraph 15 of the bill of complaint, and they denounce as gratuitously false and malicious the allegations in said paragraph, that "the defendants have entered into an unlawful combination or conspiracy with one J. Fraser Lyon, the present Attorney-General of the State of South Carolina, and under whose advice said defendants are acting to aid the said Lyon in carrying out his frequent threats to prosecute and imprison said officers and to that end have agreed among themselves and with said Lyon to withhold the payment of the claim of your orator and all other creditors until the said Lyon has obtained such evidence as may be sufficient to prove the guilt and secure the conviction of said officers; that under and pursuant to this agreement, combination or conspiracy, the defendants have refused and are still refusing to carry out the provisions of the Act of 1907." (77) The defendants aver that they withheld payment until the State could have an opportunity to collect the evidence with regard to said claims, and after a regular and orderly hearing, the Commission could reach a fair decision as to the validity and justice of the various claims.

21.

It is further averred that after the hearing of the case of Ullman & Co. on the 15th day of January, 1908, the Commission and the Counsel for the State were then and there ready to hear and determine the other cases assigned in their regular order, but said cases were not heard because of the absence of some of the claimants and because of the failure of others to comply with the reasonable orders of the Commission. Thereupon the Commission assigned all of the remaining cases for hearing to be commenced on January 30th, and to continue from day to day until all of said cases have been finally disposed of. It is the purpose of said Commission to hear and decide the cases in their order, upon the calendar, and notices to this effect were sent the various claimants by registered mail, and unless prevented by the orders of this Honorable Court, the Commissioners will execute said purpose and will pay each and every claim which shall be determined to be due and owing by the State.

22.

It is further averred that the State is the owner of said funds and should be sole defendant, at least the State is an indispensable and necessary party.

Defendants are advised that the State is not subject to suit and cannot be the sole defendant, or the defendant at all, and that therefore the court is without jurisdiction, but they submit that if it had jurisdiction there is no necessity for the appointment of a Receiver. The State authorized the Commission to act in the premises and these defendants have undertaken to discharge their duties fairly, promptly and conscientiously. They submit that all the allegations and insinuations made in the bill of complaint charging neglect, delay, or im-
(78) proper or fraudulent conduct on the part of these defendants are unfounded and false, and they submit that they should be permitted to complete the work and discharge the responsibilities imposed upon them by the State.

23.

These defendants demand strict proof of each and every allegation in the bill of complaint contained, except those herein specifically admitted to be true.

24.

The defendants submit herewith a number of affidavits and they pray that the same may be taken in connection with and as a part of their return, and having fully answered they pray to be hence discharged with their reasonable costs in this behalf expended.

J. FRASER LYON,
Attorney-General, Counsel for Deft's.

STEVENSON & MATTHESSON,
ABNEY & MULLER,
ANDERSON, FELDER, ROUNTREE & WILSON,
Of Counsel.

STATE OF SOUTH CAROLINA,
County of Richland.

(79) Before me personally came W. J. Murray, John McSween, C. K. Henderson and Avery Patton, defendants in the

above stated case, who, being duly sworn, severally depose and say:

That the allegations contained in the foregoing return to the rule to show cause are true, except those stated upon information and belief, and these they severally believe to be true.

W. J. MURRAY,
JOHN McSWEEN,
C. K. HENDERSON,
AVERY PATTON.

Sworn to and subscribed before me this 28th day of January, 1908.

D. W. McLAURIN,
[Seal] Notary Public.

Judgment of Commission on Claim of Ulman & Co.

(80)

Ullman and Company
vs.
The State of South Carolina.

Anchor Distilling Company
vs.
The State of South Carolina.

Claims on Account of Sales to State Dispensary.

The foregoing matters coming on for trial before the duly constituted Commission, created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and by consent of counsel, representing the parties at interest, the two claims above stated having been heard together; after hearing the evidence submitted to the court and counsel for all parties having waived the right to make argument; we the Commission find from the evidence before us as follows:

1st. That the Anchor Distilling Company and Ullman & Company are one and the same firm composed of A. Ullman and L. C. Straus.

2nd. That the balance of account which from the books of the Dispensary it would appear stand open in favor of Ullman & Company is $35,012.47, and in favor of Anchor Distilling Company is $1,914.31, or a total of $36,926.78.

3rd. That the gross amount of sales made by said Ullman & Company and Anchor Distilling Company to the South Carolina Dispensary between September 15, 1904, and the abolition of the said Dispensary by enactment of the Legislature of the State of South Carolina amounted in the aggregate in the sum of $325,000.00.

4th. That beginning shortly prior to the purchases made by the State Board of Directors of the South Carolina Dispensary at its September meeting in the year 1904, and con-
(81) tinuing as long as purchases were made by said Board of Directors from said Ullman & Company and Anchor Distilling Company, there existed between said Ullman & Company and Anchor Distilling Company, their agents and representatives and the majority of the members of said Board of Directors of the said South Carolina Dispensary a conspiracy to cheat and defraud the State of South Carolina and its said Dispensary, and in pursuance thereof and during the said period said claimants by and with the aid and assistance of said Board of Directors or a majority thereof did cheat and defraud said State of South Carolina and its Dispensary by charging and collecting from said South Carolina Dispensary prices for the goods sold to said Dispensary which were largely in excess of the market value thereof, which overcharges were by agreement between said conspirators, made and used for the purpose of corrupting and bringing the officials and agents of the said State of South Carolina to the end that the Board of Directors of the South Carolina Dispensary might be induced to purchase the goods of said claimants in preference to the goods of other dealers in like goods of equal or better quality at cheaper prices and by reason thereof said Board of Directors were induced to buy the goods of said claimants at said excess prices and the difference between the fair market value of the goods so sold by said claimants to said South Carolina Dispensary and the prices at which said goods were so purchased from said claimants by said Board of Directors was fraudulently, unlawfully employed by said claimants in bribing and corrupting the officials and agents of said State as aforesaid, so that the said State of South Carolina and its Dispensary was cheated and defrauded out of the sum of $63,000.00.

5th. The Commission further finds that said claimants did not comply with the law of the State of South Carolina, relative to sales to and purchases by the State Board of Directors of
(82) the South Carolina Dispensary in that—

(a) They failed to comply with the provisions of said law requiring that only one bid shall be made by anyone; for

the said Ullman & Co. and Anchor Distilling Co. being in fact one and the same firm did fraudulently and deceitfully pretend that they were separate firms and did frequently make two or more bids at the same time to the Treasurer of the State of South Carolina, for consideration by the State Board of Directors of the South Carolina Dispensary.

(b) They failed to accompany their bids or any of them with chemical analyses of the liquor offered for sale.

(c) They failed to furnish any bond or bonds to insure the compliance by them with the terms of the contracts of purchase and sale between them and said State Dispensary.

(d) That they violated said law in that they constantly had agents, representatives and solicitors in the State for the purpose of soliciting the purchase of their goods by said South Carolina Dispensary, and did through their said agents and their representatives solicit business from said Board of Directors.

Whereupon it is ordered and adjudged that the said Ullman & Co. and Anchor Distilling Co. is indebted to the State of South Carolina and its Dispensary in the principal sum of $63,000.00 and interest thereon to February 16, 1907, the date of the abolition of the South Carolina State Dispensary by the Legislature of said State, in the sum of $5,317.50. That this sum be credited of Date February 16, 1907, with the aggregate amounts standing open on the books of said Dispensary in favor of said claimants, to-wit, the sum of $36,926.78; and (83) that after making the credit aforesaid the balance due by said claimants on said date, to-wit: Feb. 16th, 1907, is the sum of $31,390.72.

This January 17th, 1908, State Dispensary Commission.

W. J. MURRAY, Comr.
C. K. HENDERSON, Comr.
JOHN McSWEEN, Comr.
AVERY PATTON, Comr.

I hereby certify that the foregoing is a true and correct copy of the judgment of the State Dispensary Commission in the matter of the claim of Ullman & Co.

W. J. MURRAY, Chairman.

Affidavit of B. F. Arthur.

(84) Filed Jan. 29, 1908.

In the Circuit Court of the United States for the District of South Carolina. In Equity.

W. J. Murray et al., constituting the State Dispensary Commission of South Carolina, and W. J. Murray et al., individually, Defendants.

Before me personally came B. F. Arthur, who, on oath, says that he is a member of the State Dispensary Commission; that on account of the imperative engagements he could not go to Columbia either on yesterday or to-day for the purpose of reading over and verifying the return of the defendants in the above stated case; that he makes this affidavit to be used on the hearing of the application for inter-locutory relief. Deponent further says that the last meeting of the State Dispensary Commission, at which he was present, was in November, 1907, that he has not attended the meetings subsequent thereto, that he was prevented from attending one or more of said meeting by reason of his illness.

Deponent further says that there is no difference between the members of said Commission as to the method to be pursued in dealing with the creditors of the State for goods sold to State Dispensary and that the Commission as a body is a unit on the following propositions, to-wit:

1st. To require all creditors whose claims are challenged by the counsel for the State to produce their books of original entry and other documents containing material evidence and to comply with all reasonable and proper requirements prescribed by the Commission; 2nd, to hear all competent evidence presented by the creditors or by counsel for the State, and after a careful consideration thereof to determine what amounts are due by the State and to pay all claims which in their honest and impartial judgment are due by the State, and no others.

Deponent further swears that neither in his individual or official capacity has he now has the said Commission or any member thereof to his knowledge stated "That there would be (85) no further dispute as to the amount due," plaintiff, nor have the defendants or either of them to deponent's knowledge admitted that there was due the plaintiff "A balance of $66,501.19," or any other amount, or agreed to pay plaintiff any amount whatever, or stated that the amount due plaintiff had

been determined or agreed upon, or, "That the amount claimed by plaintiff has been admitted by the defendants to be a just liability against the State Dispensary and now due and payable out of the fund in their hands," or that the said defendants have never claimed or pretended that said amount was subject to any offsets, credits or counter-claims.

The deponent says that each and every averment in the bill of complaint to this effect, so far as deponent knows or believes is untrue. Deponent says that plaintiff's claim has never been adjusted to deponent's knowledge except to the extent that the books of the State Dispensary have been audited and the entries thereon have been brought into substantial agreement with the items of plaintiff's claim. That so far as deponent knows there has been no determination or adjustment as to whether the items on said claim are proper and just charges against the State, nor whether said claim is to be reduced in whole or in part by reason of offsets and counterclaims, is for any reason illegal."

B. F. ARTHUR.

Sworn to and subscribed to before me this 27th day of Jan., 1908.

J. F. WALKER, JR.,
[Seal] Notary Public for S. C.

Affidavit of N. Christensen.

(86) Filed January 29th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Fieschmann Company, Complainants,
vs.
W. J. Murray et al., constituting the State Dispensary Commission of South Carolina, and W. J. Murray et al., individually, Defendants.

STATE OF SOUTH CAROLINA,
Richland County.

Before me personally came N. Christensen, Jr., who, being duly sworn, makes this affidavit, to be used on the hearing of the application for interlocutory relief in the above stated case.

Deponent further says that he was a member of the Committee appointed by the General Assembly to investigate the

said dispensary and that in the discharge of his duties as said member visited in the year 1906, Cincinnati, for the purpose of investigation of, among others, the claim in favor of the plaintiff in said case against the said Dispensary. Deponent in company with Hon. J. Fraser Lyon, then also a member of the said Committee, called upon the plaintiff at its place of business in Cincinnati and after having explained to Mr. Fleischmann one of the officers thereof, the authority of the members of said Committee to investigate the books and papers of the holders of any claim against the State Dispensary, requested him, the said Fleischmann to allow him and Mr. Lyon to investigate the plaintiff's books relative to its claim against the State Dispensary aforesaid. The said Fleischmann, one of the officers of the plaintiff then and there refused to allow said inspection and notwithstanding the fact that deponent insisted upon his right to make such inspection, it was then and there declined.

(87) And the said Fleischmann then and there remarked to deponent that he was tired of investigations, and did not propose to do anything to assist therein; that he could afford to wait for his money and said in substance that he would rather lose the money than to submit to an investigation of his books.

N. CHRISTENSEN, JR.

Sworn to and subscribed before me this 28th day of January, 1908.

D. W. McLAURIN,
Notary Public.

[Seal]

Affidavit of W. H. Macfeat.

(88) Filed January 29th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Fleischmann Co.
vs.
W. J. Murray et al.

Before me personally comes W. M. Macfeat, who, on oath, makes this affidavit to be used on the hearing of the above stated case.

On the 16th day of January, 1908, at the meeting of the State Dispensary Commission, the following proceedings were had:

"Mr. LESTER: Mr. Chairman, on behalf of the Gerson-Seligman Co. and the Fleischmann Co., who are creditors of the South Carolina State Dispensary, in answer to the request of the Commission to produce certain books, and accounts, and the appearance of Mr. Early, as set forth in the Resolution of the Dispensary Commission passed January 14, 1908, the two creditors named refused to comply with this request for the following reasons, which I will state very briefly:

The first reason is that there is only one issue between these creditors and the State Dispensary, that is the question of the amount of money due to the creditors. The production of any book, or account of the Fleischmann Co. and the Gerson, Seligman Co., asked for, can only be proper under the Act appointing this Commission, in order to furnish evidence as bearing upon the amount due to these creditors, and for no other reason. The proof of the fact of the making of the contract with the State Boards as to each of these creditors lies already in the possession of this Commission, that proof consists of the advertised circulars which were issued by the State Boards asking for bids upon certain classes of goods, and consists of the offer of bids of these two creditors made at different times, which are in the possession of this Commission. So far as these two creditors are concerned those papers and accounts were presented and should be in the possession of this Commission having been delivered to them by these two creditors a year ago.

(89) The only question is as to the amount due. It is stated upon the Dispensary books and the books of this Commission that the goods which the State Boards of Directors, during the three years in which these companies did business, accepted these goods, resold the man obtained the money from the various County Dispensaries, which money formed a part of the fund in your possession. So far as the contract, or the fact of the making of the contract is concerned, the same has been fully executed by the State Dispensary buying the goods, and selling the goods and obtaining the money which is in your possession at the present time.

"As to the issue of the amount due; the Dispensary Commission has had the auditing of their books, they have ascertained the amount due, and our books, which correspond to the cent with the books of this Commission, show that they are, and I have *admit* upon the record of this Commission that the amount as set forth in the auditing of The American Audting Co., as owing by this Commission to the Fleischmann Co., and the Gerson, Seligman Co., is correct.

"Now, about May 15th, 1907, I came to this Commission, and Dr. Murray was present, and took to the proposition to

return the goods, he stated it would greatly facilitate the Board in their efforts to settle and adjust these claims if these creditors would take back the goods then on hand in the said Dispensary undisposed of. In compliance with the request, Gerson, Seligman Co. and the Fleischmann Co. ordered them to be returned, and there were returned goods of the agreed price and value of $21,000. Those goods were taken back and reduced these claims as I say, by over $21,000.

(90) "There is only one point as between us; that is not as to the return of the goods, because they are out, those goods have been taken back. The simple question of whether this Commission can now comply with the Statute, which is—

"Mr. LYON: I would suggest, when I gave my consent for Mr. Lester to proceed it was my understanding that he was going to tell in a few words the reason why he refuses to comply with the order of this Commission. If I catch the drift of his remark he is arguing his case—the law and the facts—why his claim should be paid. The Commission announced yesterday that it would take up the roster in the order arranged.

"Mr. Nelson; is here and his client and they are ready to proceed with that matter. I move that we proceed with the roster as arranged. If there is any other reason, specific reason why the Fleischmann Co. refuses to comply with the order of this Commission, the reason might be stated without argument. The Commission might proceed afterwards to hear argument if they desire to do so.

"Mr. LESTER: In reply to your objection; this Commission is now sitting as a court; they are clothed with certain powers of a court under an Act, and at the present time they are sitting in that capacity.

"Mr. LYON: You are correct.

"Mr. LESTER: I ask the court to be allowed to continue.

"Mr. LYON: There is another case set for hearing and we now call for that case.

"Mr. LESTER: I came here and have remained over here at the request made of me yesterday morning to appear and state my reasons. If it is simply a matter of the length of time which I am consuming I have no doubt Mr. Nelson will grant me a few minutes of his time.

"Mr. NELSON: Mr. Lester was summoned to be here at 10 o'clock, I hope the Committee will listen to his reasons and argument.

"Mr. FELDER: Counsel has not been advised, we have not been advised that Mr. Lester was summoned to be here this morning at 10 o'clock. As long as we are representing the State in this matter a summons or subpœna will not be issued or served without giving us notice.

(91) "Mr. LESTER: Mr. Patton told me to come here to-morrow (to-day) at 10 o'clock.

"Mr. PATTON: I said we had adjourned until 10.

"Mr. LESTER: You said would hear me to-morrow at 10.

"Mr. PATTON: I did not say anything of the kind.

"Mr. NELSON: Won't you gentlemen consent for him to go on which will enable him to get off this afternoon.

"Mr. FELDER: I made the suggestion day before yesterday that we might see the books; we do not want to discomode or put Mr. Lester out about it; we might be able to proceed with the books he has in hand if Mr. Earley is here, or will come.

"Now as to our reason for desiring Mr. Earley's presence, we are not disposed to and not required to state them. I think they will be made manifest when they come. Mr. Roy stated a few days ago that it would take thousands of dollars to bring all of these books here and that it would be embarrassing to their business, and all that sort of thing. We intend to accommodate counsel and facilitate hearings. If I understand Mr. Lester to say that he declines to bring any books, or declines to produce a witness called for who is without the jurisdiction of this State and cannot be brought unless he voluntarily comes, the man who conducted, negotiated this business, who was in charge of this territory for three years, we are at our row's end. Any reason he might think—

"Mr. NELSON: He is proceeding to give those reasons. I hope you gentlemen will allow him to proceed.

"Mr. ANDERSON: If he will simply state his reasons there will be no objection to his giving them.

"Mr. FELDER: Counsel is making an elaborate legal argument; he is proceeding to announce legal principle. We are not ready to argue his reason on the merits just at this time.

(92) "Mr. NELSON: You can reply to it at leisure.

"Mr. FELDER: The case is not up for argument. We will argue these legal questions when we come to them.

"Dr. MURRAY: The question is whether or not you will comply with the request we gave you, Mr. Lester; just say yes or no.

"Mr. LESTER: I ask *that* the court to be heard before them and to present my reason; the reasons may be more or less immaterial to the Commission, or to counsel of the Commission. I desire to state my reason in justice to the Commission. I have been before them four times. I have taken a certain stand with reference to the $400,000 worth of the creditors here. I consider it due to the Commission that I state the reasons why I have withdrawn from this arrangement. I have given so far the first reason, which I have stated.

"Mr. LYON: I object to Mr. Lester proceeding further. The Commission have ordered him to bring his books and papers to produce a witness, and he comes now before us to argue all these phases of his case. The Commission agreed upon its roster—docketed cases—it has set a case to be heard and the State is prepared to proceed with the case set for hearing, and not ready to proceed with the case Mr. Lester is arguing. If Mr. Lester has stated all the facts without any argument that he appears to want to make to this Commission I move that this matter be discontinued now and that we take up the case set for hearing.

"Mr. LESTER: It is not my intention to force a legal argument upon the Commission, or upon counsel; I wish to have upon the records of this Commission as briefly as I can state them the reasons that we refuse to comply with this order. Is there objection?

"Mr. FELDER: My information is that counsel came here this morning and announced that unless this matter was considered—I do not know whether this is correct or not—at this time, that he would go to Asheville and appeal to the Federal Judge; I do not know whether this is so or not.

(93) "Mr. LESTER: I can set you right before you go further, if you refer to me Mr. Felder. I did not state to any member of the Commission that unless this matter was taken up I would go to Asheville; I did state to the Commission that I proposed to go into the United States Court and bring an action against the Commission, the papers in that case have been prepared for several weeks.

"Mr. FELDER: We do not want counsel to stand before this Commission and state that he refuses to comply with his orders which are reasonable in order to make a record here to go to Asheville with. We object to his putting in the record before this Commission with a prepared argument the reason why he will not comply with this order. We call upon the Commission to proceed with the case announced for hearing.

"Mr. LESTER: I have no intention to put the Commission in any improper or unwarranted position.

"Mr. FELDER: We will cross the Federal Court *bride* when we reach it.

"Mr. LESTER: I make formal demand to pay the amount of these two creditors upon the auditing of the American Audit Co., which demand I assume is refused.

"Mr. PATTON: We will not do it in the face of Judge Pritchard's order.

"Mr. LESTER: Proceed to audit our account in accordance with the agreement that we have on the 3rd of January.

"Mr. PATTON: We will hear that later.

"Mr. LYON: When your case is reached we will proceed to audit this account and will expect Mr. Early and the Fleischmann Co. to produce books, papers, etc.

"Mr. LESTER: That we refuse to do.

"Mr. FELDER: I ask if the gentlemen who is with Mr. Lester, Mr. Overhault, as the representative of the Fleischmann Co., if he is the alter ego of the corporation.

"Mr. LESTER: He is not. He is not the executive officer.

(94) "Mr. FELDER: Can't have an attachment issued against him then requiring him to produce these papers. We ask that the case be called.

"Mr. PATTON: The Ullman & Co. case is set for 10 o'clock this morning.

"Mr. LESTER: I will meet you gentlemen at Phillipi.

"Mr. LYON: We will meet you there.

(The Ullman case entered upon.)

Deponent further says that he was the sworn stenographer for the Commission at the time that he took the above said proceedings and that he has correctly transcribed the same from his shorthand notes.

W. H. MACFEAT.

Sworn to before me this 27th day of January, 1908.

[Seal]

A. H. SEATS,
N. P. S. C.

Affidavit of W. H. Macfeat.

(95) Filed January 29th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Fleischmann Co., Plaintiff,
vs.
W. J. Murray et al., constituting the State Dispensary Commission, and W. J. Murray et al., individually, Defendants.

Before me personally came W. H. Macfeat, who, on oath, makes this affidavit to be used on the hearing of the application for temporary relief in the above stated case.

The deponent further says that he was the sworn stenographer for the said Commission on Dec. 20, 1907, and at the meeting of said Commission on said day the proceedings hereto attached were had; that deponent stenographically took said proceedings and he has correctly transcribed same from his

shorthand notes, and the said proceedings are accurately set forth in the nine sheets of paper hereto attached and made a part of this affidavit.

W. H. MACFEAT.

Sworn to before me this 27th day of January, 1908.

A. H. SEATS,
[Seal] N. P. S. C.

(96) Columbia, S. C., December 20, 1907.

The State Dispensary Commission met at twelve o'clock M.

Present: Messrs. Patton, Murray, Henderson, McSween, members of the Board. Also Atty. Gen. Lyon; also Mr. D. S. Matheson, of the firm of Stephenson & Matheson, attorneys for the Commission were present.

Mr. George B. Lester, attorney for the creditors appeared before the Commission and desired to make a statement and to submit a proposition.

Mr. Lester spoke as follows:

Mr. CHAIRMAN: We had a meeting of the creditors of the Board in Cincinnati a week ago on Monday; this meeting was called at the instance of the Fleischmann Co., which firm I represent as general counsel. It was called for the purpose of primarily endeavoring to put before the creditors who would appear at this meeting the position of this Board and the rights of this Board under the Acts creating it and the other Acts relating to the winding up of the Dispensary affairs.

I have followed the Dispensary situation personally on behalf of our company for several months, first taking it up the latter part of this year, and as Mr. Murray knows, I came here last spring about the 5th of May for the purpose of adjusting the accounts of the Fleischmann Co. I found after conference with him that matters were in a considerable state of confusion, and that this confusion could be relieved in a great measure by the creditors according to the suggestion of this Board in taking their goods back, which were not consumed, or had not been used, or distributed among the County Dispensaries. I spent several days here and made several inquiries. I returned to Cincinnati and advised our people to take back all the goods which were unused, as, in my judgment, this would facilitate the Board in their efforts to wind up the Dispensary

affairs, and it would be one long step towards accomplishing the result that I assumed we were all after.

Our people were asked by a number of firms in the West as to their attitude and as to the proposition of taking the goods (97) back. This was shortly after the notice of April 15. We advised them all to accede to the request of the Board and to take back such goods as were not used, all the goods that were on hand at the dispensary. As I understand, most all the firms complied with the request.

I attended the trial and *hear* the arguments in the Garrick case for the purpose of getting further light upon the view which counsel for this Commission and counsel for the State had of this liquidation proposition; and I came to the conclusion that the contention of the State as set forth by Atty. Gen. Mr. Lyon and by Mr. Stephenson, presented the proper view of this situation from the standpoint of the rights of this Board.

There have been many rumors around among the creditors as to what certain attorneys had represented they could do for them, "We can get your money; we can do this and that;" and they had the impression that the payment of their claims were being held up without any right. At this meeting in Cincinnati we were confronted with a number of men whose idea, as I apprehen it, was to pass resolutions of indignation or something similar to that, to take action more or less violent to get their money. I was requested on behalf of those present to present my view as to the situation, and I told them that the first thing that they should take under consideration was the right of this Board under the law, the rights that this Board had under the law, before they went forward with any proposition to try to collect their money. I told them, which I understand is the fact, that this Board occupies a position similar to the receiver of a corporation, or any other organization, that they were confronted with a very much muddled state of affairs when they took this matter up, and that inside of seven or eight months they had converted all available assets into money, as I understood it; that I did not think that in the space of the time allotted them that they had unreasonably delayed the payment of any claim; that no creditor who had any experience in insolvent corporations (and most of them who were present had) (98) could complain that this Commission or any body connected with it had not used due diligence in getting these matters straightened out; and I further advised which *in* my belief at the present time, that this Commission has the power to adjust and settle accounts, and for this purpose they have the right to gather evidence, examine witnesses and to occupy and carry on the functions of a court practically; that is my view of it; that every one of the creditors was subject to the revision

of his account and to a revision of his dealings with the old board of directors of the State Dispensary by this Commission; that this Commission had the power to do that. I said what we want to do is this. We want to get together and go before that Commission through a Committee or through some representative and take up these accounts one by one of those here who are willing to go, to get some adjustment, to see if we can arrive at a basis or principle of settlement, and when we can arrange at a basis or principle of settlement of these accounts then the details can be worked out very easily.

Now, these creditors appointed a committee to frame a plan at the meeting. I was on that Committee and we framed up the following plan, that the creditors there present should select a Committee of three of the members with power to negotiate with this Board on a proposition of settlement of the claims of the creditors; that this committee should have power to settle without further action upon this basis, to waive interest upon all their claims, to agree with this Board that the actual payment of all claims would be deferred until some date to be agreed upon, not later than the first of April. That proposition was put in and discussed for this reason; we understand and believe we had been credibly informed that all moneys arising from the liquidation of the Dispensary matter were in the banks of South Carolina, and knowing that the present financial condition is such that the immediate withdrawal of a large sum of money from any locality, whether South Carolina or anywhere else, would embarrass any of the bankers; so we agreed that this committee would have the power to defer the payments of these amounts until some future time, provided (99) we can arrive at some basis of settlement. Then the question came up of the discount on our claims. Some of the gentlemen present argued at great length that if we went before the court, if this Committee went before this Commission, and said "here, we are willing to take off a certain amount for the purpose of settlement, waiving the interest, taking off a certain percentage in order that we may have immediate settlement, and that that should be incorporated in the plan, and that was incorporated in the plan; and this Committee was given the power first to take off the discount on the claims of the creditors who signed this agreement, that the settlement should be adjusted upon the basis of six per cent. reduction from only the face value of the claims exclusive of interest. I have here the agreement and I will read it.

"We, the undersigned creditors of the South Carolina State Dispensary, hereby appoint Geo. B. Lester, E. M. Babbitt and Wm. Hull, our attorneys in fact, for us and in our names,

respectively, to represent us in the adjustment and collection of our claims and demands against the said South Carolina State Dispensary and, to that end, to do all things as they deem necessary or advisable; that they are empowered to negotiate with the Dispensary Commissioners, or their attorney, for the settlement of our claims and we are under no obligation to accept any settlement so negotiated, unless with further written consent to be signed by ourselves either at a meeting of creditors or by each individual creditor of the Dispensary.

Provided, however, that in the event the above named attorneys are able to settle our claims at a discount of nor more than six per cent. from the net face value thereof, without interest, that our said attorneys are hereby authorized to settle said claims upon said basis and for us and in our names to collect, receive and receipt for all such sums as shall be paid on said claims, remitting to us respectively the balance, after taking said six per cent. discount, or less, as the case may be, and our pro rata share of the necessary expense and disbursements of the above named committee.

(100) We do hereby further agree to furnish to our said attorneys in fact, if necessary, a full and completely itemized statement of our account, duly verified, at any time after the execution of this agreement by us."

Signed by the following—

Mr. W. D. Roy: Before you read the names I wish to say I was not present, but a gentleman friend of mine who did sign the name Belroy Distilling Co., wrote me a letter and asked me to sign it as President. I am with Mr. Lester in all he has stated except the discount. I am not willing to discount my claim. I am going to leave that for the Commission, if they think it just or not.

Mr. LESTER: I will read their names and the amount of their claims.

	Principal.	Interest.
Clarke Bros. & Co.,	$68,760.03	$2,188.84
A. Lehmann & Co.,	15,595.58	
The Fleischmann Co.,	66,501.19	5,809.58 to Oct. 15, '07.
The Gerson-Seligman Co.,	4,485.50	302.94 to Oct. 15, '07.
Strauss Pritz & Co.,	7,980.56	412.35
W. W. Johnson & Co.,	1,945.99	

(101)	Principal.	Interest.
The Old 76 Distilling Co., W. C. Sanders, V. P.	3,662.83	219.77
Joseph A. Mangus & Co.,	18,204.25	930.70 to Jan. 1, '08.
H. Rosenthal & Sons,	4,543.63	215.05
The Live Oak Distg. Co.,	27,972.22	1,482.82 to Jan. 1, '08.
Ullman & Co.,	35,012.47	2,100.75 to Jan. 1, '08.
Anchor Distillery Co.,	1,914.31	258.10 to Jan. 1, '08.
D. Sachs & Sons,	9,041.33	510.56 to Jan. 1, '08.
Richard & Co., By M. H. Goodman.	1,775.50	100.00 to Jan. 1, '08.
Bellair Distg. Co. (about) By M. H. Goodman.	$ 6,250.00	
Anhuiser-Busch B. Asn., Per E. S. Clauss.	19,555.09	$ 733.16 to Jan. 1, '08.
The Frank Tullidge Co., Per J. D. Blairstros.	1,135.94	67.52 to Dec. 31, '07.
Gallagher & Burton, Per T. M. Morderson.	———	———
The H. A. Thurman Co., E. M. Babbitt.	9,478.45	601.44
Jno. T. Barber & Co., E. M. Babbitt.	1,809.58	———
Belroy,	40,008.33	2,154.59

Mr. LESTER: (Addressing Mr. Roy) You had better put your claim in on this subject to your agreement as above except the agreement for discount. Belroy, $40,008.33.

Mr. ROY: We unite in all other parts of the agreement except the agreement to discount at six per cent.

Mr. LESTER: That is the situation as I have stated to you gentlemen. I have stated substantially what occurred up there without going into the details of it.

Now, this Committee after the meeting was over, the meeting of the creditors, we got together and thought best that some one of the Committee should go before this Commission, rather than go through the usual method of employing atttorneys, etc., that probably it would be better as business men to come to-

gether, and I was designated by the Committee, appointed to come here and talk this matter over with the Board.

I have a few ideas of my own on this proposition of discount. It seems to me that the first thing, if the Commission are ready to take up the question of payment of these claims, is to arrive at some basis of settlement, either by taking up each individual claim and discounting that, or to take them up as a lump amount substantially on the basis which these creditors have agreed, or upon some other discount basis. Personally I (102) think the fairest way would be to take up each claim individually, and as I understand a good many of these creditors are subject to deduction for the very good reason that they have charged the Dispensary more for goods than they were getting from other customers, and getting more money out of the Dispensary, than they were legitimately entitled to. I am willing to take any method that the Commission are willing to adopt, but there is one thing I want to do. I want to go back to these creditors with some kind of proposition, some kind of agreement, tentative or otherwise, so we can act upon it, and get the rest of the people in. It is a very difficult thing to get these creditors together, each has his own individual view. I think we were exceedingly fortunate in getting the number that we had at the meeting. If I can go back to the creditors with some kind of tentative agreement with this Commission as to the adjustment of their claims I think we will have no difficulty in getting every proper and legitimate creditor of this Dispensary into line and adjust these claims. I am perfectly willing to take up this matter of getting these people in line.

I have about stated the situation from the creditors' standpoint. If Mr. Lyon or any other member of the Board would like to make a suggestiton I would be glad to have you do so. I have talked with most of the creditors and know their positions.

Mr. Lyon: I am not in a position to discuss the matter, or to argue anything at all in regard to this proposition until it is discussed by the Board when they see fit to come together after discussing it among themselves, the general proposition. As I understand the matter, I am called here simply to advise them in regard to it, and they are responsible for whatever action is taken. If there is anything on which my advice is desired, I am at their service.

(103) Mr. Patton: South Carolina certainly wants to pay every honest dollar it owes, and dollar for dollar, and anything that would look like a compromise, I do not think the State of South Carolina would entertain it for a moment. I know our position through the Commission will be to pay every just

claim, dollar for dollar, and if they are just we will not take a cent off; but at the same time the rights of the State will have to be protected in the matter of overcharges. That is the reason why we called for books and papers and persons who are competent to testify as to prices, rebates, etc. We did that under our authority of the act which authorized us to withhold these claims until such persons were in the custody of the Commission with their books and papers and themselves prepared to testify. We know there have been overcharges of the most outrageous kind and we have in a great many instances evidence that is unmistakable, those overcharges are so common that we are justified in believing that it is a general thing. There may be some concerns, and I have no doubt there are, who have not overcharged the Dispensary, and they ought to have their money in full, those who have overcharged ought to be able to settle with the State at the market value. It might be a hardship to bring books and papers here, but it would also be a hardship for the State to pay overcharges that we know exist in some cases.

Mr. LESTER: *That is the very meat of the cocoanut.* I do not know anything about any of these claims except I personally represent the Fleischmann Co., I can answer for them, if they have made any overcharges they will take it off. Every piece of goods upon which there was an overcharge was taken back upon my advice, and I think every bit of the goods left on our account is bulk stuff sold at $1.50 and $1.65 per gallon upon which we paid $1.10 revenue and the balance as manufacturing cost.

The notice which was sent out gave no time at which these books were to be produced. Personally I do not believe there (104) will be any to produce his books, except the matter of inconvenience and the lack on information which the commission could get, unless we produced the whole volume of books, there is a distinct hardship in any concern, especially situated as our company is, whose business is several million of dollars over a length of purchase covering a period of one year and I think when the representative of these people come here and say that he is willing on their behalf to take off any overcharge there may be, that the result of the Commission is accomplished.

Mr. HENDERSON: How are we going to arrive at the overcharges unless we have the books?

Mr. LESTER: When the Commission has agreed upon the amount of overcharges, we will go to the creditors and say "Here, your amount of overcharge is so much, you will have

to take that off, if you do not want to take it off, drop out of this arrangement, if you do want to take it off, we will take it up with this Commission again," that is the only practical way we can get at this.

Mr. HENDERSON: That is practical if they agree with what we claim. We want to prove by their books what they charged people similarly situated.

Mr. LESTER: I doubt if you could prove that by the books. What you could show by the books would be similar goods, or rather what appeared to be similar goods, was sold in like qualities to customers at lower prices, but in the whiskey business, in the spirit business age of the goods may make a difference of several dollars on a case. For instance, a man orders, the Dispensary, say, orders whiskey of a certain proof and certain age which is sold open simply, that may be five years old rye, now that whiskey is sold under a certain brand at ten or eleven dollars per case and sometimes that whiskey under brand of two or three years whiskey could be sold for seven dollars per case. You are going to get up against a question of fact wherein (105) every man who has dealt with the Dispensary is going to offer his evidence along this line. For instance, we make a brand of whiskey which we carry in bond for six or seven years that we sell for three and four dollars per gallon to compounders and we pay warehouse charges and we pay for exportation shown by the *regaging* and we pay interest, etc., that whiskey is sold at, say, as Old Crow for instance, it is not that whiskey, say Old Crow Rye, these people buy, it has the government stamp, Government stamp of the date of entry of the barrel and the date of taking it out of bond on the barrel and they pay four or five dollars a gallon for it; we can make a rye that we call old crow that we can sell for $1.50 per gallon, which is done right along through the trade, there is not one concern in the world that does not do it. The whiskey people who buy this stuff, they can tell it in a minute, there is no deceit about it, it is an absolutely understood thing, whether straight or blended goods, whether compounded or blended goods, is absolutely known and every one has a different price. Mr. Roy here is a whiskey man and he knows that.

Mr. ROY: If you gentlemen will get one of my bids to the County Dispensaries, you will find that I have only one brand, Belroy, you will find my Fall '04 Belroy $1.97½, and Fall '01 Belroy $2.37½; looks like an overcharge of forty cents per gallon, that is the difficulty that you will confront in looking

for overcharges on the whiskey books. So far as my books are concerned, whenever you want them they will be at your service.

Mr. LESTER: These things can only be ascertained definitely by having here the men connected with every one of these firms and take up these accounts with the representatives who are familiar with the goods at the time they were sold and take up every item of every account and have them to testify or explain concerning it. You will see that this would be an endless task. I do not believe there is one on that list but what is willing to do that or anything that you desire, but as a matter (106) of convenience and as a practical method at that, it is an absurd and tedious way. What I prefer to do would be to take the Commission's estimate of the deduction of these accounts and go to these people, or have them meet in Cincinnati, or some other convenient point, and say to them, your account is so much and for this reason that you have charged so and so in Savannah, Nashville, Chattanooga, etc., nine dollars a case for your goods and you have charged the dispensary twelve dollars a case for your goods and you have sold them 425 cases, consequently your account is reduced—whatever the Commission may find it to be—you can take it or leave it, if you take it we will settle on that basis, if you want to contest it you can go ahead and produce your books and go before the Commission and they will hear you. That is my idea of getting at it. These men are willing to adjust their accounts on a fair basis.

Affidavit of William Banks.

(107) Filed January 29th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Fleischmann Company, Complainant,
vs.
State Dispensary Commission of South Carolina, and W. J. Murray et al., individually, Defendants.

STATE OF SOUTH CAROLINA,
Richland County.

Before me personally came William Banks, who, being duly sworn, says on oath that he is city editor of The State, a daily newspaper published in the City of Columbia, said State and county and in such capacity as city editor of said paper

handled two communications dated at Asheville, N. C., Jan. 1, 1908, which was published in said paper on the morning of January 20th, 1908, in the first column of the second page of said issue.

Deponent further says that the copy of the latter to The State as published is a correct copy of the original which was received by due course of mail and contained as an enclosure an open letter to T. Moultrie Mordecai, Esq., Charleston, S. C., said letter to the State requesting the publication of the letter addressed to Mr. Mordecai and the letter so addressed and published following said letter to The State is a correct copy of the original and a copy of said letters as published as heretofore attached. Deponent identifies both of said originals by writing on the margin of each sheet "Identified as originals, William Banks."

WILLIAM BANKS.

Sworn to and subscribed before me this Jan. 27th, 1908.

[Seal] A. H. SEATS,
Notary Public, Richland County, South Carolina.

The State, Columbia, S. C., Monday, January 20, 1908.

(108) LESTER REPLIES TO MR. MORDECAI.

Further Controversy Upon the Issue of Veracity Between Charleston Lawyer and the Attorney of the Whiskey Trust.

To The Editor of The State:

I enclose herewith copy of letter which I have to-day sent Mr. Mordecia of Charleston, S. C. This is in answer to an open letter published in your issue of Jan. 17, 1908, directed to me and to the public in general and purporting to be written and signed by Mr. Mordecai, and so published at his request. If you think the subject is of sufficient interest to your subscribers and the public I would be glad to have you publish this letter.

GEORGE B. LESTER.

Asheville, N. C., Jan. 18, 1908.

Asheville, N. C., Jan. 18, 1908.

T. Moultrie Mordecai, Esq., Charleston, S. C.

Dear Sir: Your letter under date of Jan. 6, 1908, published in the Columbia State, in the issue of Friday, Jan. 17,

1908, has been brought to my attention this evening and as the statement is dignified and I believe is what you believe to be a fair account of the facts as you view them, it is certainly entitled to a reply from me.

Your account of the circumstances of our meeting in Richmond and up to the time of the meeting in Cincinnati is correct. The reason I sought you out in Richmond when I was there was that Mr. Gibbes Whaley, a former townsman of yours, had recommended you as an attorney of ability and one familiar with the dispensary situation. Mr. Whaley had sent me letters and copies of letters you had written to him during the summer of 1907 in reference to the dispensary matters, which letters I have now in my possession.

Your proposition of a lump sum settlement and your plan of procedure seemed reasonable and convincing; so much so, that upon your assurance we called the meeting of creditors in Cincinnati. You did state to me that you represented about (109) $165,000 in claims of creditors, and made this statement before the Cincinnati meeting. It was in some degree, upon this assurance that we adopted your plan and called the meeting.

What took place at the meeting of the committee appointed by the creditors, where you claim you were retained as counsel, is known to four people, Mr. Hull, Mr. Babbitt, you and myself. My recollection is very clear, and I believe the other two gentlemen of the committee will corroborate me when I assert that we told you severally that we were willing for you to take up the proposition of a lump sum settlement with Mr. Stevenson, and get the best terms you could and report the result of your negotiations to me at Charleston. I stated to you that this would have to be done by you at your own expense and subject to the right of the committee to accept or reject the plan of settlement agreed upon, and is rejected, or you could make no progress you were to drop out; but if your plans succeeded we would enter into an agreement for your compensation. You probably recollect also that I offered to give you a written memorandum of this arrangement, but you declined. You were not retained as counsel of the committee in any sense. Your position was entirely that of a negotiator, who if he can bring the parties together and effect a settlement is entitled to his compensation but not otherwise. That you failed in your efforts is a matter of too recent and painful history to discuss.

When I telephoned you after seeing Mr. Stevenson, that your discount plan of settlement had been turned down it was after a conference with the latter and Dr. Murray, and I then told you that I proposed to go before the commission alone and you expressed disappointment, that your plans had come to

naught, and afterwards wrote me a letter telling me your views, as to how the present the matter to the commission.

I never had the slighest idea of turning you down or of dealing in any but a fair way with you and assured you in Cincinnati and in Charleston that when at attorney was needed, I would advocate retaining you, not only for the company I represented but for all other creditors who joined us.

(110) Your telegram which you sent Sunday, was not received by me until the day before I left for Cincinnati, and I fully expected you would be there, so delayed answering. You did not appear at the meeting, which fact was commented upon.

In the meantime Roy had broken loose with that unfortunate letter, which utterly failed in its purpose and misstated the situation. I don't know what better evidence you would want that Roy and his "syndicate" had broken with me. The trouble with you was that you underrated your strength with certain of the large creditors and thought that they as well as myself had thrown you down. Such was not the fact. I advocated your retention at the last Cincinnati meeting, in case that suit was brought and certainly would have retained you in our case, and I believe Mr. Warts would for his company, and I feel quite confident that other of the large creditors would have done the same. Even after your telegram was received, I did not change my views as to this, but when I found out in Asheville, that you had, as I supposed, broken faith with all the creditors by taking away the Wilson Company who not later than a week before had sent us their power of attorney, and you succeeded in again tying up the funds, I concluded that you believed that the committee as well as myself had thrown you down and you had taken this hasty action to "get even."

Your action was ill advised and unnecessary, as the committee were then on their way to Columbia and would have straightened out your matter, I believe, to your entire satisfaction.

You have been led into error concerning the Melton incident, and made statements that are not strictly true as regards may conduct in that affair, and as the statement I am about to make can be readily verified by Mr. Melton himself, who is a thoroughly honorable member of your profession, I trust you will avail yourself of my suggestion to set yourself right.

I met Mr. Roy in Charleston, and gave him a letter ad-
(111) dressed himself which he could show to Mr. Melton, in which letter I authorized Mr. Roy to retain Mr. Melton to act for the committee until Dec. 28th, 1907, but no longer and to open negotiation through the banks Mr. Roy now has that

letter I assume, I fully intended to advise you of this arrangement when you arrived in Charleston, but before you arrived I had been in Columbia had seen Mr. Melton and he had declined to act, now for the reason stated in the Roy letter but for reasons sufficient for him.

You will recollect that I did tell you that plan of settlement had been discussed with Mr. Melton and others, and that it had been abandoned. Such was the fact and from the Saturday before I saw you in Charleston, I had never seen Mr. Melton but once, and that was in his club at Columbia, and the matter was not referred to and no other agreement or offer to retain Mr. Melton has ever been made by me or any of the committee since I last saw you in Charleston, or have any of us seen him, except as I have above advised.

Neither myself nor the committee had any dealings with the so-called "Syndicate" until Jan. 2, 1908, when we submitted a proposed contract to the National Loan and Exchange Bank to employ them to represent the creditors in collecting their claims, which the bank refused to sign.

It now appears not only from your statement but from other facts that have come to my knowledge, that you had some reason to believe that the committee had broken faith with you, and counted you out of their calculations. Such was not the fact prior to your action in the Wilson case. The whole Committee were on their way to Columbia immediately after the last meeting at Cincinnati with the intention of taking up with you in person your claims that you were counsel and endeavor to have you and whatever creditors you represented join with the committee under some satisfactory arrangement.

As it was your action interfered with the committee's (112) plans of settlement for the time, but as other influences have since intervened to prevent the possibility of any satisfactory settlement with the commission a discussion of this phase is useless. I want to set you right on one statement. I did not telephone to Asheville and my stopping over here was purely accidental, owing to the fact that the train for Columbia did not wait for the train we were on. By the merest chance I learned that your injunction had been granted, and I took immediate action to protect the rights of my clients. In regard to the statement published in the Columbia State on Jan. 2, I have not the article before me, but my recollection is that it is substantially correct as to the main facts, viz.: you were never retained as counsel for the Committee and you claimed to all of us that you represented $165,000 of claims, and did not produce them and your negotiations for a settlement came to nothing.

I am sending a copy of this letter to The State, as it is by their favor in publishing your communication that I have been made aware of your grievances.

I am in hopes that they will in fairness to me, give me a part of the "space" they have given to you.

Yours respectfully,

GEO. B. LESTER.

Affidavit of John T. Meehan.

(113) Filed January 29th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

The Fleischmann Company, Complainant,
vs.
W. J. Murray, et al., constituting the State Dispensary Commission of South Carolina, and W. J. Murray, et al., individually, Defendants. } In Equity.

STATE OF SOUTH CAROLINA,
Richland County.

Before me personally came John T. Meehan, who, being duly sworn, says on oath that he is a reporter for "The State," a daily newspaper published in the city of Columbia, said State and county, and that he occupied the position as reporter of said paper on December 31, 1907, and January 1, 1908.

Deponent further says that in his capacity as said reporter he had an interview with George B. Lester, attorney for the above stated complainants, on December 31, 1907, at the Colonia Hotel, in the city of Columbia, at about 9 o'clock P. M. on said date, and the statements made to deponent at that time were published in "The State" on Thursday morning, January 2, 1908, under the heading "Papers Received in Wilson Case," the same appearing on page 9, first column, of the issue of said date.

Deponent further says that following the sub-head "Mr. Lester's Statement," in said article above referred to appears

the correct report of the interview as had with Mr. Lester, and a copy of said article containing the statement is hereunto attached.

Deponent further says that subsequent to the publication of said interview he met Mr. Lester in the Parlor Restaurant, in the city of Columbia, at which time the said Lester stated (114) that the article as published was absolutely correct, with the exception of the reference as to Mr. Mordecai, and as to this he stated to deponent that it was well that he had cut out some of the references to Mr. Mordecai. Deponent further says that on this occasion the conversation took place in the Parlor Restaurant, as stated, between the hours of 1 o'clock A. M. and 2:15 o'clock A. M. on the 16th of January, 1908, and that during said conversation the said Lester reiterated the statement formerly made in which he expressed confidence in the State Dispensary Commission and invited deponent to be present at the hearing to be had that morning at 10 o'clock A. M. at the State Dispensary and said to deponent "the commission will be sitting as a court and they cannot refuse you admission."

JOHN T. MEEHAN.

Sworn to and subscribed before me this January 27th, 1908.

[Seal] A. H. SEATS,
Notary Public, Richland County, South Carolina.

(115) The State: Columbia, S. C., Thursday Morning, January 2, 1908.

Papers Received in Wilson Case.

Certified Copies of Petition and Injunction Order.

Mr. George B. Lester Talks.

Explains Mr. Mordecai's Connection with the Creditors of Dispensary. The Wilson Claim.

A certified copy of the petition filed by the Attorneys for the Wilson Distilling Company and the temporary restraining orded issued by Judge Pritchard were served upon the Dispensary Commission yesterday by mail. The service the day before was only of the injunction, which was sent by tele-

graph from the clerk of the United States Circuit Court in Charleston.

The petition recites that the action is instituted at this time as the complainant understands that the commissioners are about to pay out certain money and liquidate the affairs of the Dispensary. The petition states that a quantity of liquor was sold to the Dispensary in 1906 through the directors, authorized to purchase it, including whiskeys and liquors to the amount of $2,979.12, which were duly accepted and were sold at a large profit. None of this liquor has been paid for and now that preparations are being made to meet certain claims, the complainant institutes its action, believing that unless the commissioners are restrained by preliminary injunction the "defendants" will pay out on improper claims a large part of the funds in their hands aforesaid and will convert into the Public treasury of the State of South Carolina a large part of said fund, to the irreparable damage of your orator and other persons having just claims against said dispensary and against said fund in the hands of the defendants."

The suit is brought, the orator avers, on its own behalf and in behalf of all other persons having just claims against the dispensary and against the fund in the hands of the defendants. The petitioner then asks the issue of the preliminary restraining order which Judge Pritchard saw fit to grant.

Mr. Lester's Statement.

(116) According to Mr. George B. Lester, chairman of the Committee representing the majority of the whiskey creditors, a meeting of the principal creditors of the State Dispensary was held in Cincinnati on Dec. 9, at which time a committee of three was appointed to adjust the accounts of the various creditors represented at the meeting. "At this Meeting," Mr. Lester states, "Mr. T. M. Mordecai, appeared and vouchsafed the information that he represented about $175,000 worth of claims of Southern creditors and was in a position to get an early settlement of all accounts against the State Dispensary. He informed this body that he was familiar with all that had been done by the commission, understood clearly just what was necessary to secure the money from the commission and if given the authority by this meeting of creditors he would immediately proceed to collect the accounts. He had letters showing that he was a prominent and an able attorney, etc.

"Mr. Mordecai wanted to make a proposition to the Commission that they pay all of the claims of these creditors, less a discount of 6% and less interest. He was informed that it

was not the purpose of the creditors there represented to employ any attorneys at this time, but he was told to go ahead and present his proposition to the commission and report to the committee appointed.

"Mr. Mordecai, presented his proposition and it was promptly rejected by the Commission. They informed him that they did not propose to settle any of the accounts on that basis, that they would take up each account, and as soon as it was found to be all right would adjust it.

"That is all Mr. Mordecai had to do with settling the claims which this special committee represents and which we have power of attorney to adjust. I called upon Mr. Mordecai and asked him who were the creditors he represented to the extent of $175,000, and I found that he represented but one claim, which amounted to about $4,000. He was informed that the committee did not need his services at this time.

"Just how he managed to get hold of the claim of the Wil-
(117) son people I do not know. I have power of attorney in my pocket now, signed last Thursday by the vice-president of the Wilson Distilling Company, and Mr. Mordecai has managed to get hold of this account some way since that date."

Praises the Commission.

Mr. Lester says that he is satisfied that the commission has no other desire than to treat the creditors of the State Dispensary with all fairness. "I am satisfied that they will pay out the money which justly belongs to each creditor as soon as the different accounts can be adjusted. I have never felt that the commission had any desire to purposely delay the payment of any of these claims. They want to investigate each claim thoroughly, which they have a right to do, before making any payments.

"I consider that this commission has done remarkably well in disposing of the vast amount of property which they were put in charge of in so short a time. Under a receivership at least twice the time would have been consumed. They have practically completed their work, in just a little over eight months and deserve credit for it."

Mr. Lester says that he does not that any serious inconvenience will be occasioned by the order issued by Judge Pritchard. He says he is confident that the injunction will be dissolved on the 11th, or at least, that not more than the amount of the claim of the Wilson Distilling Company will be held up by the court.

The proceedings instituted by Mr. Mordecai and associated differ from the recent action taken by Garret & Co. of Nor-

folk against the Dispensary Commission, in that the former proceedings were for a mandamus, which Judge Pritchard refused to sustain upon the final hearing.

Proposition as to Loan and Exchange Bank.

(118) Filed January 29th, 1908.

Exhibit "A."

(118) We, the undersigned creditor of the State Dispensary of South Carolina, hereby appoint the National Loan & Exchange Bank, of the City of Columbia, S. C., and W. D. Roy, of Louisville, Ky., attorneys in fact for us and in our name to represent us in the adjustment and collection of our claim and demands against the said South Carolina Dispensary, and to that end employ such attorneys and other persons, and to do all such things as they may deem necessary or advisable with full power of substitution. Provided, however, that no authority is herein given to institute any proceedings at law, without first referring it to us and obtaining our consent thereto.

And we do hereby agree to allow the said National Loan & Exchange Bank and W. D. Roy six per cent. (6%) of all sums as may be hereafter collected, or paid, or satisfactorily secured to be paid on our claim for such services as may be rendered by them or other persons employed by them.

And we do hereby authorize and empower the said National Loan & Exchange Bank and W. D. Roy for us and in our name to collect, receive and acknowledge receipt for all such sums as may be paid on our claims, remitting us the balance after deducting the said six per cent. (6%) for their services and expenses.

In the event disputes or differences shall arise as to the amount due on said claims, or the prices charged in said claims and demands, or as to any other matter effecting the amount thereof, it is understood that the same shall be referred to us for advice and instructions.

We also agree to waive interest on said claim and demands if such waiver be found necessary to facilitate a settlement.

And we do hereby agree to furnish to our said attorneys in fact a full itemized statement verified, or our said claims and demands, forthwith upon the execution of this agreement by us.

List of Banks in which Deposits are Secured by Collaterals.

(119) Filed 29th day of January, 1908.

National Loan and Exchange Bank,	$220,000.00	Columbia, S. C.
The State Bank,	50,000.00	" "
The Palmetto National Bank,	60,000.00	" "
The Peoples Bank,	10,000.00	Union, "
The Bank of Timmonsville,	10.000.00	Timmonsville, S. C.
The Columbia Savings Bank & Trust Co.	45,000.00	Columbia, S. C.
The Bank of Charleston,	70,000.00	Charleston, S. C.
The Peoples Loan & Exchange Bank,	5,000.00	Laurens, S. C.
The Bank of Orangeburg,	14,000.00	Orangeburg, S. C.
The National Exchange Bank,	5,000.00	Chester, S. C.
The Bank of Aiken,	35,000.00	Aiken, S. C.
The Commercial Bank,	5,000.00	Camden, S. C.
The Peoples Savings Bank,	5,000.00	Abbeville, S. C.
The City National Bank,	20,000.00	Greenville, S. C.
The Greenville Savings & Trust Co.,	10,000.00	Greenville, S. C.
The Lexington Savings Bank,	5,000.00	Lexington, S. C.
The Peoples National Bank,	15,000.00	Charleston, S. C.
The Peoples Bank,	20,000.00	Greenville, S. C.
The Norwood National Bank,	15,000.00	Greenville, S. C.
The Bank of Camden,	20,000.00	Camden, S. C.
The Merchants & Farmers Bank,	10,000.00	Spartanburg, S. C.
The First National Bank,	5,000.00	" "
The Central National Bank,	5,000.00	" "
The Bank of Dillon,	10,000.00	Dillon, S. C.
The Enterprise Bank,	10,000.00	Charleston, S. C.
The Merchants & Planters Bank,	10,000.00	Gaffney, S. C.
The Farmers & Merchants Bank,	5,000.00	Anderson, S. C.
The Merchants & Farmers Bank,	23,594.23	Cheraw, S. C.
The Farmers & Merchants Bank,	2,500.00	Walterboro, S. C.
The Commercial & Savings Bank,	10,000.00	Florence S. C.
The Bank of Hartsville,	10,000 00	Hartsville, S. C.
The National Loan & Exchange Bank,	16,505.59	On deposit as on active account, after charging up all outstanding checks.
Total,	$706,599.82	

Appearance of Palmetto National Bank of Columbia.

(120) Filed February 29th, 1908.

Weston & Aycock,
Attorneys at Law,

Columbia, S. C., February 28th, 1908.

Hon. C. J. Murphy,
Clerk United States Court,
Charleston, S. C.

Dear Sir:

Please note our appearance for the defendant the Palmetto National Bank of Columbia, in the case of the Fleischmann Company, complainants, against W. J. Murray et al., defendants.

Also kindly enter our appearance for the same defendant in the matter of the Wilson Distilling Company et al., complainants, against W. J. Murray, et al., defendants.

Thanking you for your attention, we are,

Very truly yours,

WESTON and AYCOCK.

Notice of Appearance for the Columbia Savings Bank and Trust Co.

(121) Filed March 2nd, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleischmann Company, Complainant,
against
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, and The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Co., all of Columbia, South Carolina, The Bank of Timmonsville, of Timmonsville, South Carolina, The Peoples Bank of Union, South Carolina, The Piedmont Savings and Investment Company of Greenville, South Carolina, The Merchants and Farmers Bank of Cheraw, South Carolina, and the Bank of Camden, Camden, S. C., Defendants.
} In Equity.

To the clerk of the said court:

Please enter our appearance as attorneys for the Columbia Savings Bank and Trust Co., (erroneously styled The Columbia Saving and Trust Co.), defendant, in the above entitled cause.

MELTON & BELSER,
Attorneys for the defendants, the Columbia Savings Bank and Trust Co.

Dated at Columbia, S. C., this 29th February, 1908.

Appearance of the National Loan and Exchange Bank.

(122) Filed March 2nd, 1908.

Law Offices

Allen J. Green. Walter T. Green.

Columbia, S. C., February 29th, 1908.

Mr. C. J. Murphy,
Clerk U. S. Circuit Court,
Charleston, S. C.

Dear Sir:

In the matter of

The Fleischmann Co., Complainants,
vs.
W. J. Murray et al., Defendants.

Complaint filed on equity side of the court, you will please enter my appearance for the defendant The National Loan and Exchange Bank of Columbia in said case and oblige,

Yours truly,

ALLEN J. GREEN,
Attorney for The National Loan and Exchange Bank.

Acknowledge receipt.

Order Continuing Injunction.

(123) Filed March 2, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleischmann Company, Complainant,

vs.

W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, and The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Company, The Bank of Timmonsville, The Peoples Bank of Union, The Bank of Aiken, The Piedmont Savings & Investment Company, and The Merchants and Farmers Bank and the Bank of Camden, Defendants.

Order.

This cause came on to be heard before the undersigned Judge at Chambers in Asheville, North Carolina, on the 29th day of January, 1908, upon the notice to show cause why the relief prayed for in the bill should not be granted any why a receiver should not be appointed to take charge of all the funds in the hands of the defendants, constituting the State Dispensary Commission of South Carolina, and upon the defendants' return to said notice, and having been heard, and the court being of the opinion that the temporary restraining order heretofore granted, on the 22d day of January, 1908, should be continued in force until the final determination of this cause, and that the complainant is entitled to the injunction as prayed for in said bill;

It is, now, on motion of George B. Lester and Merrick and Barnard, solicitors for the complainant, ordered, adjudged and decreed by the court that the temporary restraining order heretofore issued in this cause on the 22d day of January, 1908,

be, and the same is, hereby continued in full force and effect until the final determination of this suit, or until the further (124) order of this court, and that the defendants and each of them, their agents, attorneys and employes, be, and they are, hereby restrained and enjoined from interfering with, paying out or transferring to any person or persons whomsoever, or in any way disturbing or changing the present status of the fund now in their control and possession, and from taking any steps with reference to said fund, tending to or which may put the same beyond the jurisdiction of this court; and,

It is further ordered that an injunction *pendente lite* issue in accordance with this order; and, it is further ordered that the motion of the complainant for a receiver of said fund be, and the same is, hereby continued, without prejudice to the right of the complainant to renew the said motion at any time, upon ten days notice to the said defendants, or any of them, or to their counsel of record,

This February 29th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Appearance of W. J. Murray, et al.

(125) Filed March 2, 1908.

Telegram.

The Western Union Telegraph Company.

20 Ca. H. O. R. 40 paid. 443 p. m.

Received at 145 East Bay Street, Charleston, S. C., 1908.

Dated Columbia, S. C., 2 Mch.

To C. J. Murphy,
Clerk U. S. Circuit Court,
Charleston, S. C

Please enter our special appearance in the case of Fleischmann et al. against Murray et al. for defendants Murray, Henderson, McSween, Patton and Arthur, for the purpose of objecting to the jurisdiction of the court and for no other purpose.

ABNEY & MULLER.

Opinion.

(126) Filed 5th day of Mch., 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

The Fleischmann Company, Complainant,
versus
W. J. Murray et al., Defendants. } Opinion.

This is a suit in equity brought by the complainant to have the defendants declared trustees as to a certain fund in their hands, to determine the amount due to the complainant payable out of the said fund, and to compel the payment of the amount so found to be due.

The record shows that in 1892, the General Assembly of the State of South Carolina passed an Act regulating the purchase, sale and distribution of intoxicating liquors within said State, and providing for a board consisting of three members, to be known as the "Board of Directors of the State Dispensary." The said Act also provided for a Dispensary Commissioner to be elected by the General Assembly and made it the duty of the Board of Directors of the State Dispensary to purchase all alcoholic liquors for lawful use within the State, and to sell the same to the various county dispensaries, as provided in said act. The law further provided that all money arising from the sale of liquors by the Board of Directors of the State Dispensary should be deposited with the State Treasurer, to be held by him as a separate and distinct fund, and kept to the credit of the said Board of Directors of the State Dispensary. That the liquors purchased by the said Board of Directors of the State Dispensary should be paid for out of this fund upon a warrant to be issued by the said Dispensary Commissioner, such warrant to be issued by the Dispensary Commissioner at the direction of the said Board of Directors of the State Dispensary, and no part of this fund could be lawfully paid out by the State Treasurer, except upon warrants issued.

(127) That while said law was still in force, the complainant sold to the board of directors of the State Dispensary, at prices mutually satisfactory and agreed upon, a large quantity of whiskey and other spirituous liquors, all of which whiskey and spirituous liquor, except a small portion of which was afterwards returned by the defendants, were duly accepted and sold by the said directors of the State Dispensary at a substantial profit, in accordance with the dispensary law, and the proceeds

of such sales were in due course of administration, deposited in and became a part of the fund hereinbefore referred to.

That the General Assembly of the State of South Carolina, at its session held in 1907, passed an act providing for the abolition of the State Dispensary, which act was duly approved on the 16th day of February, 1907, and section 47 of which is as follows:

"Section 47: The State Dispensary is hereby abolished, and all acts and parts of acts inconsistent with this act, are hereby repealed; Provided, That this act shall not have the effect of preventing any violation of the present criminal law relating to the Dispensary being punished as now provided by law for offenses heretofore committed."

That at the same session of the General Assembly, of the State of South Carolina passed another Act entitled "An Act to Provide for the Disposition of all property connected with the State Dispensary and to wind up its affairs," which said Act is in words and figures as follows:

"Session Laws, S. C., 1907.

"No. 402.

"An Act to provide for the disposition of all property con-
(25) nected with the State Dispensary, and to wind up its affairs.

"Sec. 1. Be it enacted by the General Assembly of the State of South Carolina that immediately upon the approval of this act, the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

"Sec. 2. Said Commission shall immediately organize by the election of a Chairman and a Secretary from their number.

"Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judg-

ment may dictate: *Provided*, that no alcoholic liquors or beers shall be disposed of within the State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations, from whom purchased, and for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants and stenographers, and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts con-
(129) nected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State; *Provided, further*, that all payments shall be made in gold and silver coin of the United States, in United States Currency or in national bank notes.

"Sec. 4. The compensation of each member of said Commission shall be $5.00 per day for each day actually employed about the business and actual expenses for the time engaged. *Provided*, that they shall receive no compensation for services rendered on this Commission after January 1st, 1908.

"Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

"Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employes as they may deem necessary, and to contract with them at the time of employment for their compensation.

"Sec. 7. The said Commission shall submit to the Governor at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

"Sec. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary,as prescribed by an Act to Provide for the Investigation of the Dispensary, approved January 24th, A. D., 1906, be and hereby is, conferred upon the Commission provided for under this Act; provided, that for purpose of the investigation

of the affairs of the Dispensary as herein provided, each and every members of said Commission be and hereby is, authroized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

"Approved, the 16th day of February, A. D., 1907."

This Act was approved on the same day as the Act abolishing the State Dispensary, to-wit: the 16th of February, 1907, and within a short time thereafter, the Commission provided (130) for was created by the appointment of the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, as Commissioners, and said defendants having duly qualified and organized pursuant to the said Act, became and do now constitute the State Dispensary Commission and as such are charged with the execution of all the powers conferred and the performance of all the duties imposed upon said Commission by the said Act.

That immediately upon their qualification as Commissioners, and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and, in accordance with the Act providing for their appointment, took possession and control of the entire business and property of the State Dispensary, including the money which was at that time deposited with the State Treasurer to the credit of the Board of Directors of the State Dispensary, and said defendants, have sold the property of said State Dispensary, except real estate, and collected many of the debts due to the said Dispensary, and now have in their hands the proceeds arising from said sales and collections, which, together with the sum received from the State Treasurer, amount to about eight hundred thousand dollars.

That all the money realized from the sale of the property of the said State Dispensary and the collection of debts due to it, has been from time to time, as received by the defendants constituting the State Dispensary Commission, and now is deposited to the credit of said Commission in certain banks in the State of South Carolina, subject to withdrawal only by said Commission, and no part of said money is in the Treasury of the State of South Carolina, or has ever been mingled with any funds belonging to said State.

That the complainant furnished to the defendants, at their request, an itemized statement of its account against the State Dispensary which account has been compared with the books kept by the State Dispensary and found to be in substantial

agreement with said banks. That complainants' account has (131) also been audited by the company employed by the defendants for that purpose, and the complainant insists that, in accordance with said audit and the books of said State Dispensary, its account is correct, and that there is now justly due and owing to it, out of the funds in the hands of the defendants, directed to be applied to the payment of the just liabilities of the State Dispensary, a balance of $66,501.10. Which balance is a just liability of the said State Dispensary, and although complainant has demanded said amount, the defendants have refused to pay the same or any part thereof.

Complainants ask that a receiver be appointed to take charge of and administer all the moneys now in the hands of the defendants, arising out of the sale of property belonging to the State Dispensary of South Carolina, or from the collection of debts due to it, or direct and decree that the amount due to complainant be immediately paid to it upon the execution of a good and sufficient bond conditioned to pay to defendants such sum or sums as may be found to be due to them by complainant and adjudged to be paid by it; that this court appoint a master with a view of having its claim passed upon and determined, and also requests this court to grant a writ of injunction restraining the defendants from paying out or disposing of any of the moneys now in their hands until there can be an adjudication of the matters in controversy between complainant and defendants.

It is contended by counsel for defendants, first, that the funds in the hands of the State Dispensary Commission, created by the Act of February 16th, 1907, belong to and are the property of the State, which has the right to control the same, and which, through the said Commission as its agent, is in possession thereof.

Second. That the said State Dispensary Commission is the mere agent or instrumentality of the State vested with the ministerial function of winding up the State Dispensary's business, selling the goods and property on hand, collecting the debts due the State in connection with said business and holding the proceeds for the State and subject to its right of dispo- (132) sition thereof. And also with the judicial function of investigating all claims in connection with said business, and determining the validity thereof, and that this Commission is a court within the meaning of section 720 of the Revised Statutes of the United States.

And also vested with the ministerial function of paying from the funds held by them for the State such of the said

claims as they may upon said investigation find and decide to be just liabilities of the State.

Third. That the pending action is in effect an action against the State, because it seeks to lay hold of funds belonging to the State and in the hands of said commission, as its agent, and through the said Commission in the possession of the State, and further seeks to have such funds applied to the payment of alleged liabilities of the State.

So that the State is an indispensable party to the action.

Fourth. That the State cannot be held to have waived its constitutional immunity from suit by the said act creating the "State Dispensary Commission," except to the extent of the remedies therein provided for and allowed to claimants for the collection of such debts as may be due them by the State in connection with its said Dispensary business, and, therefore, such claimants are limited to the remedies therein provided for and allowed.

Fifth. That the said act creating the State Dispensary Commission having been passed and the remedies therein provided for having been allowed, as a purely voluntary matter on the part of the legislature of the State, the said act is subject to be repealed and the allowance of the remedies therein provided for is subject to be recalled at any time at the pleasure of the legislature and in its discretion."

Counsel representing the defendants do not agree as to the contention that this commission is a court within the meaning of section 720,—one of the distinguished counsel being of the opinion that this commission is not a court within the meaning of that section. The court has carefully considered the arguments on this point, and, after much investigation, has reached the conclusion that the contention of the defendants (133) in this respect is untenable. It is admitted that the commission does not have the power to enter final judgment or to issue an execution, and while it is invested with certain powers, they are not to any appreciable extent judicial in their character. The authority conferred upon them to make inquiry is only for their own information and guidance and does not confer upon them the power to judicially determine the matters submitted to them, and, this being so, the court is forced to the conclusion that it is not a court according to the well defined meaning of the term.

The next question is as to whether this is a suit against the State or whether it is a suit to which the state is an indispensable party, and in order to reach a correct determination of this

question, it becomes necessary to inquire as to the nature and character of the duties required to be performed by the defendants under the act authorizing their appointment.

The defendants are charged with the duty of settling and adjusting the unsettled claims against the State Dispensary at the time it was abolished, and are required by the provisions of the act hereinbefore mentioned to ascertain*ed* and pay such sums as may be found to be due the several creditors of the State Dispensary.

These defendants are not officers of the state within the meaning of the ordinary acceptation of the term. If officers at all, they are officers appointed solely for the purpose of performing specific duties. In the case of *W. U. Tel. Co.* v. *Myatt*, 98 Fed. Rep., 335, the court says: "The act of the legislature creating the court of visitation and the act extending the powers and jurisdiction thereof to telegraph companies cast upon the officials who are defendants in this suit the special duty of administering and enforcing said laws. Their officers were created solely for such purposes, and such defendants are not general officers of the state, whose duty it is to see to the enforcement of laws generally, and who act only by formal judicial proceedings in the courts of the state. This suit, (134) therefore, is not against the state of Kansas, and hence is not within the prohibition of the eleventh amendment to the Constitution of the United States."

By this suit it is sought to enforce the rights of complainant in accordance with the provisions of the act in question. The object of this suit is not to coerce the defendants into doing something which the state law forbids them doing, but to compel them to do what the state statute requires shall be done.

At the time that the state dispensary was abolished, state dispensary funds to the amount of about $150,000 were on deposit in the state Treasury, and there was property connected with the state dispensary and a large amount due to it for goods which had been sold to the county dispensary. The defendants have sold the property and collected a large number of the debts, the proceeds arising from such sales and collections amounting to about $650,000, which, together with the $150,000 received from the State Treasurer, makes a total of about $800,000. The amount of money in the state treasury belonging to the dispensary fund, as well as the amount realized as hereinbefore stated, was turned over to the defendants and by them placed to their credit in a number of banks in the state. This sum was placed in their banks for the specific purpose of carrying out the provisions of the act, to-wit: The adjustment and settlement of the claim of complainant and those who were similarly situated.

It is obvious, from a careful reading of the statute, that the legislature intended that this fund should be treated as a special trust fund arising out of the operation of the State Dispensary, to be used primarily for the purpose of settling all just liabilities incurred by the state dispensary in the purchase of goods during its existence. The purpose sought to be accomplished by the legislature was the payment of the outstanding indebtedness of the state dispensary, as well as the disposal of its property and to wind up its affairs as a business concern.

The fact that this money was realized from the sale of goods purchased from the creditors of the state dispensary, when considered in connection with the action of the state legis-
(135) lature, in placing the entire funds in the hands of the defendants for the purpose hereinbefore mentioned, clearly constitutes this a trust fund in the hands of the defendants, as trustees who are charged with the duty of carrying out the purposes of the act.

While it is estimated that the state dispensarys' indebtedness amounted to only about $600,000 yet the legislature provided that all the funds, amounting to $800,000 should be placed under the dominion and control of the defendants, thus clearly indicating that it was the intent of the legislature that every dollar of the funds realized from the State Dispensary was to be treated as a trust fund first for the purpose of settling these claims, and then providing that any surplus remaining should be paid into the state treasury as funds properly belonging to the state.

This action on the part of the legislature is significant, and clearly indicates that the chief object in appointing the commission was to provide for the payment of claims similar to that of complainant. The legislature having authorized these defendants to withdraw the funds in the hands of the state treasurer, thereby surrendering the states' possession, of the same, for the purpose hereinbefore mentioned, shows most conclusively that this fund was intended to be treated as a trust fund and was to be used by the defendants for the purpose of carrying out the provisions of the act under which they were appointed.

It cannot be reasonably insisted, in view of these circumstances that the state is an indispensable party to this suit, inasmuch as it is not necessary that the state should be a party in order that there may be a final determination of the matters involved in this controversy. Therefore this is not a suit against the state within the meaning of the eleventh amendment.

The principal question involved in this controversy is as to whether the claim of complainant is a just liability against the State Dispensary. If it should be determined to be a just

(136) liability, the statute in question makes it the duty of the defendants to pay it, and, under these circumstances, the question sought to be litigated is one in which the state is not interested in the sense contemplated by the eleventh amendment.

In the case of *Louisiana* v. *Jumel* and other like cases, it was sought to compel the state officers to perform a duty either not directed to be done by the statute, or prohibited by it, or to enforce payment out of general funds, or where there was no special fund which the state itself had appropriated to and charged with its payment.

In the case of *Rolston* v. *Missouri*, 120 U. S., the court said:

"There (in the Jumel case) the effort was to compel a state officer to do what the statute prohibited him from doing. Here the suit is to get a state officer to do what the statute requires of him."

The court in a further discussion of this subject, said:

"It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the eleventh amendment of the Constitution of the United States, and Louisiana *v.* Jumel, 107 U. S., 711, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustee when they make a certain payment. The trustees claim that they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied; but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the trustee must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for."

(137) This principle is fully sustained in the cases of
Osborn *v.* Bank, 9 Wheat., 738;
Board of Liquidation *v.* McComb, 92 U. S., 531;
Pennoyer *v.* McConnaughy, 140 U. S., 1;
Reagan *v.* Farmers Loan & Trust Co., 154 U. S., 389;
Scott *v.* McDonald, 165 U. S., 112;
Tindal *v.* Wesley, 167 U. S., 220.

The failure of the defendants to comply with the statute cannot be treated as a refusal of the state to comply with the statute. On the contrary, it is a refusal on the part of the defendants to do that which they have been directed to do by the statute. Therefore a suit instituted against the defendants for the purpose of requiring them to perform the duties enjoined upon them by the statute is a suit against them as individuals and is not in any sense a suit against the state.

As hereinbefore stated, it is insisted by counsel for the defendants that the commissioners are vested with discretion and judgment to pass upon the question as to whether or not the claims of creditors are just and valid, and that, therefore, this court cannot interfere with such judgment or discretion. The rule that courts will not control an officer in the exercise of discretion conferred upon him is subject to qualification, and this is especially true in a court of equity when its exercise affects individual rights.

It is well settled that the courts have the power to prevent an abuse of discretion and require that it is exercised according to law and in such manner as not to unjustly injure property rights.

"Auditing officers will be required by mandamus to make their audit according to law. If the compensation is fixed by statute or agreement, they will be required to audit the compensation so fixed. If they have already audited an account for a less sum than that fixed by statute or agreement, they will be required to set aside the audit already made and to reaudit according to law." Amm. & Eng. Enc. Law, (1 Ed.), Vol. 14, 149, *People* v. *Elmira Auditors*, 82 N. Y., 80.

(138) The act authorizing the appointment of these commissioners does not undertake to give to them discretion as to what claims to pay, but expressly directs them to pay all just liabilities. Hence, it follows, that if a claim is just, their duty is mandatory and they possess no judgment or discretion as to its performance.

It appears from the allegations of the bill that these defendants already exercised the discretion with which they are invested by auditing and adjusting several accounts claimed to be due.

It is alleged in the bill, and admitted by the return, that the claim of the complainant has been audited by the company employed by the defendants for that purpose and has been found to correspond with the books kept by the state dispensary board.

Among other things, it is charged in the bill that the defendants have improperly managed the funds placed in their

hands. A careful consideration of the evidence fails to sustain this contention, it clearly appearing that these defendants have done no wrong in that respect, and that they are gentlemen of high character and standing.

It is insisted by counsel for defendants that this suit is instituted solely with a view of avoiding an investigation of the transactions between the state dispensary and the complainant and other creditors in the purchase of whiskey and other spirituous liquors. This contention is unfounded, inasmuch as this court will afford every opportunity for a complete and thorough investigation of any and all transactions connected with the former management of the state dispensary in the purchase of the goods the payment for which is now sought.

While the Supreme Court of South Carolina has decided that the act authorizing the establishment of the state dispensary and the purchase and sale of whiskey by the state was constitutional, it cannot be reasonably contended that in so doing the state was performing the functions usually exercised by a state necessary to preserve its autonomy and maintain its sovereignty. Nor can it be assumed that it was contemplated, at the time of the adoption of the eleventh amendment that a (139) sovereign state would ever engage in the purchase and sale of spirituous liquors for profit.

The state having seen fit to engage in this business, and at the same time to deprive its citizens of the right to engage in such business in competition with the state, thereby placed itself in a position where it could not with consistency, avail itself of the immunity conferred by the eleventh amendment in a suit like the one at bar which it is sought to collect a debt contracted by the individuals placed in control of such business with implied, if not direct, authority to contract such debts.

Having deprived its citizens of the rights to engage in this particular line of business, reserving the right to monopolize the same through its agencies appointed for that purpose, it would be manifestly unjust to permit the state, under any circumstances whatsoever to avoid the payment of debts contracted by the purchase of goods from the sale of which it has derived enormous profits.

And even if this were a suit against the state treasurer instituted for the recovery of funds set apart for the express purpose of paying the indebtedness thus contracted, as in this instance, it might well be questioned as to whether such officer could claim immunity under the eleventh amendment.

However, the court does not undertake to pass upon this phase of the question, inasmuch as the record shows that this is not a suit against a state official, or in any sense such a suit as is contemplated by the eleventh amendment.

For the reasons hereinbefore stated, the court is of opinion that it has jurisdiction and that the injunction heretofore issued should be continued to a final hearing.

At the time this opinion was announced, counsel stated in open court that the Attorney General of South Carolina had made application to the Supreme Court of that State for a mandamus to compel the defendants to pay over the sum of $15,000 (that amount being appropriated by an Act of the legislature, out of this fund to the use of the Attorney General) the (140) same to be used in prosecuting parties charged with violation of the law in connection with the management of the state dispensary. This action on the part of the attorney General, is in the nature of a surprise and was entirely unnecessary, inasmuch as this court, if proper application had been made by the defendants or the attorney general, would have gladly authorized the use of the same for such purpose, inasmuch as it appears that after the payment of this amount there would remain in the hands of the defendants funds amply sufficient to satisfy all claims involved in this controversy. This seems to be an unwarranted attempt to provoke a conflict of jurisdiction between this court and the state courts of South Carolina.

J. C. PRITCHARD,
U. S. Circuit Judge.

March 3rd, 1908.

Affidavit of George B. Lester.

(141) Filed March 9th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

The Fleischmann Co. vs. W. J. Murray et al. } Affidavit of Geo. B. Lester.

Geo. B. Lester, being first duly sworn, deposes and says that he is the general counsel for the above named plaintiff, and in the absence of time to have this affidavit made by one of its officers, makes the same in its behalf.

That as affiant is informed and believes, on Thursday, the 5th day of March, 1908, the Governor of the State of South Carolina sent a message to the Legislature of said State, which is now in session, copy of which message taken from the State, a newspaper published at Columbia, in said State, and which

affiant is informed and believes is a true copy of said message; that affiant is further informed and believes that acting upon such message, there has been introduced in the General Assembly of said State a bill directing the State Dispensary Board to turn the funds in their hands into the State Treasury of said State, said funds being the same enjoined by this court from being in any way paid out or changed until its further order.

That as affiant is advised and believes there is danger thus arising of said funds being placed beyond the jurisdiction of this court and plaintiff prevented from recovering the amounts justly due it from the defendants, and otherwise irreparably damaged, unless this court take said fund immediately into its actual possession by the appointment of receiver or receivers therefor.

GEO. B. LESTER.

Sworn to and subscribed before me this March 6th, 1908.

[Seal] W. S. HYAMS,
Clerk U. S. Circuit Court, Asheville, N. C.

(142) The defendants desire to have the application for the appointment of a receiver in this case and the application for the appointment of a receiver in the case of Wilson Distilling Co. et al. *vs.* W. J. Murray et al., heard together and to that end, the defendants without waiving jurisdiction rights waive the days notice of an intention to apply for the appointment of a receiver in the former case. This March 6th, 1908.

J. FRASER LYON, Attorney-General,
ABNEY & MULLER,
ANDERSON, FELDER, ROUNDTREE & ANDERSON,
Attorneys for defendants, W. J. Murray and others, Commissioners and as individuals.

(143) ANSEL TAKES A HAND.

Calls upon the Legislature to take steps to protect the Autonomy of the State against Foreign Intervention.

Gov. Ansel has taken a hand in the controversy between the State Authorities and Judge Pritchard of the Federal Court.

Last night he sent a special message to the General Assembly urging that action be taken to protect State Sovereignty.

Following is his special message:

To the Honorable the Senate and House of Representatives of South Carolina:

Owing to the fact that the funds of the State of South Carolina which are now in the hands of the Commission to wind up the State Dispensary are sought to be taken from their hands and to be administered by the United States Court, without the consent of your honorable bodies, the only department of the State Government which has the right to give consent that the State be sued.

And as the Autonomy of the State must be maintained and the rights to administer her funds by her own agents preserved; and feeling that you realize the great principle of State Sovereignty and the rights of a State under the constitution of the United States,

I respectfully recommend such legislation, at this session of the Legislature as will protect the interests of the State and obviate the necessity for further action on your part.

Respectfully,

M. F. ANSEL, Governor.

Executive Chamber, Columbia, S. C., March 5th, 1908.

Affidavit of George B. Lester.

(144) Filed March 9th, 1908.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT OF THE UNITED STATES,
FOURTH CIRCUIT. IN EQUITY.

The Fleischmann Co., Complainants,
vs.
W. J. Murray et al., Defendants.

George B. Lester, being duly sworn, deposes and says:

That he is an attorney and counsellor at law, residing in the City of New York, State of New York, and is General Counsel for the Fleischmann Company, a corporation having its principal office in the City of Cincinnati, State of Ohio;

that on behalf of the Fleischmann Company, and various other creditors, he appeared before the South Carolina State Dispensary Commission on various occasions during the months of December, 1907, and January, 1908, for the purpose of effecting a compromise or settlement of the claims of the Fleischmann Company against the State Dispensary funds, as well as a settlement of the claims of the other creditors represented; that for some time prior to the 14th day of January, 1908, deponent had been in the City of Columbia, and has thoroughly familiarized himself with the conditions surrounding the liquidation of the State Dispensary affairs by the present Commission; that subsequent to the last mentioned date, deponent has made or caused to be made, various investigations, to ascertain, if possible, the reasons why the present Commission has refused to pay the creditors' claims; that deponent is informed and believes that, some months prior to the 2d day of January, 1908, negotiations were entered into by the Attorney General on behalf of this Commission, with one Thomas B. Felder, Attorney at Law, of Atlanta, Georgia, for the rentention of the said Mr. Felder, or his firm, or both, to assist the Attorney General, in the gathering of evidence against alleged criminals or suspects in the State of South Carolina, who were connected (145) with the affairs of the late Dispensary boards; that, pursuant to these negotiations, a tentative agreement was entered into between the Attorney General representing this Commission, and the said Mr. Felder, or his firm, by the terms of which Mr. Felder, or his firm, were to gather evidence of alleged criminal conduct on the part of the officials of the late State Dispensary, and also to collect evidence as to alleged overcharges on goods sold by claimants to the Dispensary, in order to reduce or cut down the amounts of the various creditors' claims when the same came on for adjustment before this Commission. Deponent is informed and believes that, on the 2d day of January, 1908, a formal agreement was entered into between the Attorney General and this Commission, upon the one side, and the said Mr. Felder, and his firm, upon the other side, by the terms of which agreement and in consideration of the production of evidence by the said Mr. Felder, or his firm, tending to show alleged overcharges for goods sold to the Dispensary by various claimants and for other considerations, the Commission agreed to pay to the said Mr. Felder and his firm a commission or percentage of ten per cent., or upwards, upon all sums deducted from the claims of the various claimants, and to turnover to the said Mr. Felder and his firm, complete charge of the adjustment of the creditors' claims before this Commission; that, pursuant to that agreement, although this Commission had, prior to the last mentioned date, agreed to

settle the claims of all creditors upon their appearances before the Commission and the production of the their sales books, this Commission did, on the 14th day of January, 1908, turn over to the said Mr. Felder and his associates, the complete management of the proceedings before their body, so far as the adjustment of creditors' claims was concerned, and Mr. Felder, pursuant to the agreement before mentioned, has, since that date, represented the Commission in the various hearings before them upon creditors' claims. That deponent is informed and believes that it has been the intention and policy of this Commission, acting through their attorney, Mr. Felder to cut (146) down and reduce claims of creditors as much as possible, irrespective of the justice of said claims; that these proceedings had been conducted in total disregard of the rules of law and evidence; that claims have been cut down by alleged overcharges in an arbitrary and unreasoning manner, said Commission being advised by said attorneys that their proceedings in this regard were legal and proper; that cases have been heard before this Commission without due and proper notice to the claimants, and it now appears that the Commission acting upon the advice of Mr. Felder, have adjusted and settled certain claims aggregating upwards of $100,000, upon an arbitrary percentage deduction of 6 per cent., which said claims were represented by Mr. Lawrence Maxwell, an attorney of the City of Cincinnati, that this action has been taken by the Commission upon the advice of Mr. Felder and his associates, although it appears of record in the proceedings in the Fleischmann case, that the *the* same offer of settlement was made on behalf of many of those same creditors by this deponent to this Commission on or about the 20th day of December, 1907, and before any suit or suits were instituted against said Commission, and before any expenses had been incurred by the employment of attorneys, or otherwise, or were necessary for the adjustment of these claims. Said offer of settlement heretofore made by this deponent on the date mentioned appears in the Fleischmann suit as an exhibit offered on behalf of the defendants, in opposition to the appointment of a Receiver and the issuance of an injunction, being document No. 6 filed in that case on January 29th, 1908. That deponent is informed and believes that a systematic effort is being made by certain advisers of this Commission to place these funds beyond the jurisdiction of this court. Deponent further states that he believes that the members of this Commission have intended and do now intend to do what they conceive to be their duty in the management of the funds in their possession, but the gentlemen comprising this Commission are none of them attorneys, and are unfamiliar with law or the rules of evidence, and have

(147) acted, and must necessarily act, upon the advice of their legal representatives; that deponent is informed and believes that, in a mistaken sense of duty to the State, they have committed various breeches of their trust, and that they are now in a position where they cannot properly carry out their obligations to the creditors.

For the reasons above stated, deponent believes that it is to the best interest of creditors, as well as to the best interests of this commission that a receiver be appointed in this court to administer the funds held in trust for the benefit of the creditors.

GEORGE B. LESTER.

Sworn to and subscribed before me this 7th day of March, 1908.

FRANK D. BOOKHAM, [L. S.]
Notary Public, Buncombe Co., N. C.
My commission expires 7th Fed., 1910.

Order Granting Leave to File Amended and Supplemental Bill.

(148) Filed Feb. 24, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants. } In Equity.

Order.

Upon motion of solicitors for complainants, it is ordered that The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Company, all of Columbia, in the State of South Carolina, The Bank of Timmonsville, of Timmonsville, in said State, The People's Bank of Union, of Union, in said State, The Bank of Aiken, of Aiken, in said State, The Piedmont Savings and Investment Company, of Greenville, in said State, The Merchants' and Farmers' Bank, of Cheraw, in said State, and The Bank of Camden, of Camden, in said State, be and they and each of them hereby are made parties defendant in this cause, and it is hereby ordered that subpœnas issue for said parties according to the course and practice of this court.

And it is further ordered that the complainants have leave to file an amended and supplemental bill of complaint in this

cause, the same to relate and have affect, so far as may be, as of the date of the filing of the original bill of complaint herein.

This the 19th day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Amended and Supplemental Bill of Complaint.

(149) Filed Feb. 24, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

Wilson Distilling Company, Anheuser-Busch Brewing Association and Charles J. Gallagher, Jr., and Edward Burton, Partners as Gallagher & Burton, and John M. Cranston, trading as Jack Cranston Company, Complainants,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, Avery Patton, The National Loan and Exchange Bank, of Columbia, South Carolina; The Palmetto National Bank, of Columbia, South Carolina; The Columbia Savings and Trust Company, of Columbia, South Carolina; The Bank of Timmonsville, of Timmonsville, South Carolina; The People's Bank of Union, of Union, South Carolina; The Bank of Aiken, of Aiken, South Carolina; The Piedmont Savings and Investment Company, of Greenville, South Carolina; The Merchants' and Farmers' Bank, of Cheraw, South Carolina, and The Bank of Camden, of Camden, South Carolina, Defendants.
} In Equity.

(150)

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

Wilson Distilling Company, a corporation duly created, organized and existing under and by virtue of the laws of the

State of New Jersey, and a citizen and resident of said State, Anheuser-Busch Brewing Association, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and a citizen and resident of said State, and Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, both citizens and residents of the State of Pennsylvania, and John M. Cranston, trading as Jack Cranston Company, a citizen and resident of the State of Georgia, by leave of the court bring this their amended and supplemental bill of complaint against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of the State of South Carolina, and said defendants individually, all of whom are citizens and residents of said State of South Carolina, and the following named corporations, to-wit: The National Loan and Exchange Bank, of Columbia, South Carolina, the Palmetto National Bank, of Columbia, South Carolina, The Columbia Savings and Trust Company, of Columbia, South Carolina, The Bank of Timmonsville, of Timmonsville, South Carolina, The People's Bank of Union, of Union, South Carolina, The Bank of Aiken, of Aiken, South Carolina, The Piedmont Savings and Investment Company, of Greenville, South Carolina, The Merchants and Farmers Bank, of Cheraw, South Carolina, and the Bank of Camden, of Camden, South Carolina, all of whom are citizens and residents of the State of South Carolina; and there-
(151) upon your orators complain and say:

1.

That your orator, Wilson Distilling Company, at all times hereinafter mentioned was, and still is, a body corporate under the laws of the State of New Jersey, and is a citizen and resident of the said State of New Jersey, having its principal place of business in the City of Baltimore, in the State of Maryland; that your orator, Anheuser-Busch Brewing Association, at all times hereinafter mentioned was, and still is, a body corporate under the laws of the State of Missouri, and is a citizen and resident of said last mentioned State, having its pricipal place of business in the City of St. Louis, in the State of Missouri; that your orators, Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, at all times hereinafter mentioned were, and still are, citizens and residents of the State of Pennsylvania; and your orator John M. Cranston, trading as Jack Cranston Company, at all times hereinafter mentioned was and still is a citizen and resident of the State of Georgia; and that all said complainants are citizens of the United States

and of the States in which they respectively reside, as aforesaid.

2.

That the defendants, and each and every of them, are citizens and residents of the State of South Carolina, the said W. J. Murray residing in the City of Columbia; the said John McSwen residing in the City of Timmonsville; the said B. F. Arthur residing in the City of Union; the said C. K. Henderson residing in the City of Aiken; the said Avery Patton residing (152) in the City of Greenville; the said The National Loan and Exchange Bank is a body corporate, residing and having its principal place of business in the City of Columbia; the said The Palmetto National Bank is a body corporate, residing and having its principal place of business in the City of Columbia; the said The Columbia Savings and Trust Company is a body corporate, residing and having its principal place of business in the City of Columbia; the said The Bank of Timmonsville is a body corporate, residing and having its principal place of business in the City of Timmonsville; the said The People's Bank of Union is a body corporate, residing and having its principal place of business in the City of Union; the said Bank of Aiken is a body corporate, residing and having its principal place of business in the City of Aiken; the said The Piedmont Savings and Investment Company is a body corporate, residing and having its principal place of business in the City of Greenville; the said the Merchants and Farmers Bank is a body corporate, residing and having its principal place of business in the City of Cheraw, and the said The Bank of Camden is a body corporate, residing and having its principal place of business in the City of Camden, all in the State of South Carolina.

3.

That the matter in controversy in this action exceeds in amount and value the sum of two thousand dollars, exclusive of interest and costs, as will hereinafter more fully appear.

4.

Your orators further show that the General Assembly of the State of South Carolina, at its regular session of 1892 passed an Act entitled *"An Act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State, except as herein provided,"* the same being Act No. 28 of said (153) Session, which was duly approved December 24th, 1892, which said Act is hereby expressly referred to, and asked

to be taken as a part hereof; said Act provided *inter alia* "That on and after the 1st day of July, A. D., 1893, the manufacture, sale, barter or exchange, or keeping or offering for sale, barter, trade or exchange within this State of any spiritous, malt, vinous, fermented or other intoxicating liquor, or any compound or mixtures thereof, by whatever name called, which will produce intoxication, by any person, business firm, corporation or association shall be regulated and conducted as provided in this Act;" and provided further for a Board consisting of three members, to be known as the State Board of Control, and also provided for the appointment of a Commissioner, who was required, under such rules and regulations as might be made by said State Board of Control, to purchase all *alcholic* liquors for lawful use within said State, and to sell the same to the various County Dispensaries as provided in said Act. Said Act further provided that all money arising from the sale of liquors by the said Commissioner should be deposited with the State Treasurer, to be held by him as a separate and distinct fund, with which fund the said Treasurer was required to keep a separate account, and further provided that the expenses incurred in conducting said business should be paid out of said fund upon warrants drawn by said Commissioner and duly approved by said State Board of Control, and no part of said fund could be lawfully paid out by said Treasurer, except upon warrants so issued.

The business and monopoly thus established became known and was thenceforth recognized in the legislation of said State as the State Dispensary. By subsequent legislation amendatory of said Act of 1892, the method of conducting the business of said State Dispensary underwent various changes; the Board of Directors of the State Dispensary was thereafter created, and upon it were devolved most, if not all, of the powers and duties of said State Board of Control and certain of the duties and powers of said Commissioner, including the duty and power (154) to purchase all alcoholic liquors and other supplies for said State Dispensary; but all moneys received from said business were always required to be kept and maintained as a separate and distinct fund, subject to be drawn upon for the purpose of paying the expenses incurred in the conduct of said business.

5.

And your orators further show that while the Act set out in the last preceding paragraph hereof, amended as aforesaid, was still in force, your orators severally duly sold to said Board of Directors of the State Dispensary, at prices mutually satisfactory and agreed upon, large quantities of alcoholic liquors,

which were duly accepted and sold by the said Directors of the State Dispensary at a substantial profit in accordance with said Act, and the proceeds of such sales were, in due course of administration, deposited in and became a part of the fund hereinbefore referred to, all which will hereinafter more fully appear.

6.

And your orators further show that afterwards, at its session held in the year 1907, the General Assembly of the State of South Carolina passed an Act providing for the abolition of said State Dispensary, which Act was duly approved on February 16, 1907, and Section 47 of which is as follows:

"Section 47. The State Dispensary is hereby abolished, and all Acts and parts of acts inconsistent with this Act are hereby repealed: Provided, that this Act shall not have the effect of preventing any violation of the present criminal law relating to the Dispensary being punished as now provided by law for offences heretofore committed."

That at the same session the said General Assembly of the State of South Carolina passed another Act, approved on the same day as said Act abolishing said State Dispensary, to-wit, February 16, 1907, entitled: *"An Act to provide for the dis-*
(155) *position of all property connected with the State Dispensary, and to wind up its affairs."* which said Act is in words and figures as follows:

"Session Laws, S. C., 1907.

"No. 402.

"An Act to provide for the disposition of all property connected with the State Dispensary, and to wind up its affairs.

"Sec. 1. Be it enacted by the General Assembly of the State of South Carolina that immediately upon the approval of this act, the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

"Sec. 2. Said Commission shall immediately organize by the election of a Chairman and a Secretary from their number.

"Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, that no alcoholic liquors or beers shall be disposed of within the State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations, from whom purchased, and for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants and stenographers, and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts con-
(156) nected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State; *Provided, further*, that all payments shall be made in gold and silver coin of the United States, in United States Currency or in national bank notes.

"Sec. 4. The compensation of each member of said Commission shall be $5.00 per day for each day actually employed about the business and actual expenses for the time engaged. *Provided*, that they shall receive no compensation for services rendered on this Commission after January 1st, 1908.

"Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

"Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employes as they may deem necessary, and to contract with them at the time of employment for their compensation.

"Sec. 7. The said Commission shall submit to the Governor at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

(157)

"Sec. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to investigate the Affairs of the Dispensary, as prescribed by an Act to Provide for the Investigation of the Dispensary, approved January 24th, A. D., 1906. be and hereby is, conferred upon the Commission provided for under this Act; provided, that for purpose of the investigation of the affairs of the Dispensary as herein provided, each and every members of said Commission be and hereby is, authroized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

"Approved, the 16th day of February, A. D., 1907."

That within a short time thereafter the Commission provided for in said Act was created by the appointment of the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, as Commissioners, and said defendants having duly qualified and organized pursuant to the said Act, became, and do now constitute the State Dispensary Commission, and as such are charged with the execution of all the powers conferred, and the performance of all the duties imposed upon said Commission by the said Act.

7.

And your orators further show that immediately upon their qualification as Commissioners and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and in accordance with the Act providing for their appointment, took possession and control of the entire business and property of the said State Dispensary, including the money which was at that time deposited with the State Treasurer to the credit of the Board of Directors of said State Dispensary, and said defendants have sold the property of said State Dispensary, except real estate, and collected many of the debts due to the said State Dispensary, and now have in their hands, and deposited in the several defendant Banks, and in other depositories within the State of South Carolina, the names of which are unknown to your orators, the proceeds arising from said sales and collections, which, together with the sum so received from said State Treasurer amounts to about eight hundred thousand dollars ($800,000) as your orators are (158) informed and believe, and the sum so held in the hands

of said defendants is applicable to the payment of the just liabilities of said State Dispensary, and to the other uses and purposes designated in said Act.

8.

And your orators further show, that prior to the passage of said Acts of February 16, 1907, and while the said State Dispensary was still engaged in business, said complainant, Wilson Distilling Company, duly sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable alcoholic liquors, which were duly received and accepted by said State Dispensary, and have been sold and disposed of by it at a substantial profit; that said sales and deliveries were in all respects regular and legal, and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a lawful contract, promise and agreement, that said complainant should be paid the prices charged therefor; by reason whereof, said State Dispensary became, and, at the time the defendants, Murray, McSween, Arthur, Henderson and Patton took charge of said business and property, was, and still is, justly indebted to said complainant in the just and full sum of twenty-nine hundred and seventy-nine and 12/100 dollars ($2,979.12); that no part of said sum has been paid, and that the same constitutes, in favor of said complainant, a just liability of said State Dispensary, and, by reason of the matters and things hereinbefore alleged, and particularly by the terms of said Act of February 16, 1907, last above mentioned, said fund in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants, Murray, McSween, Arthur, Henderson and Patton were and are charged with the ministerial duty to pay the same to said complainant.

9.

(159) And your orators further show that, prior to the passage of said Act of February 16, 1907, and while the said State Dispensary was still engaged in business, said complainant, Anheuser-Busch Brewing Association, duly sold and delivered to it, at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable alcoholic liquors, which were duly received and accepted by said State Dispensary, and have been sold and disposed of by it at a substantial profit; that said sales and deliveries were, in all respects, regular and legal and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a

lawful contract, promise and agreement, that said complainant should be paid the prices charged therefor; by reason whereof said State Dispensary became, and at the time of the passage of said Act, and at the time the defendants Murray, McSween, Arthur, Henderson and Patton took charge of said business and property was, and still is, justly indebted to said complainant in the just and full sum of nineteen thousand five hundred and fifty-one dollars ($19,551); that no part of said sum has been paid, and that said sum constitutes, in favor of said complainant, a just liability of said State Dispensary, and by reason of the matters and things hereinbefore alleged and particularly by the terms of said Act of February 16, 1907, last above mentioned, said fund in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants Murray, McSween, Arthur, Henderson and Patton were and are charged with the ministerial duty to pay the same to said complainant.

10.

And your orators further show that, prior to the passage of said Act of February 16, 1907, and while the said State (160) Dispensary was still engaged in business, said complainants Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, duly sold and delivered to it at prices which were entirely reasonable and mutually satisfactory a large quantity of valuable alcoholic liquors, which were duly received and accepted by said State Dispensary, and have been sold and disposed of by it at substantial profit; that said sales and deliveries were, in all respects, regular and legal, and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a lawful contract, promise and agreement that said complainants should be paid the prices charged therefor; by reason whereof the said State Dispensary became, and at the time of the passage of said Act of February 16, 1907, and at the time the defendants, Murray, McSween, Arthur, Henderson and Patton took charge of said business and property, was, and still is, justly indebted to said complainants, which said indebtedness now amounts to the just and full sum and balance of five thousand three hundred and one and 41/100 dollars ($5,301.41); that no part of said sum has been paid, and that said sum constitutes in favor of said complainants, a just liability of said State Dispensary, and, by reason of the matters and things hereinbefore alleged and particularly by the terms of said Act of February 16, 1907, last above mentioned, said fund in the hands of said defendants became, was and is impressed with a trust for the payment

thereof, and said defendants, Murray, McSween, Arthur, Henderson and Patton, were and are charged with the ministerial duty to pay the same to said complainants.

11.

And your orators further show that, prior to the passage of said Act of February 16, 1907, and while the said State Dispensary was still engaged in business, said complainant, John M. Cranston, trading as Jack Cranston Company, duly (161) sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable alcoholic liquors, which were duly received and accepted by said State Dispensary, and have been sold and disposed of by it at a substantial profit; that said sales and deliveries were in all respects regular and legal, and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a lawful contract, promise and agreement that said complainant should be paid the prices charged therefor; by reason whereof the said State Dispensary became, and at the time of the passage of said Act of February 16, 1907, and at the time the defendants, Murray, McSween, Arthur, Henderson and Patton took charge of said business and property, was, and still is justly indebted to said complainant in the just and full sum of five thousand nine hundred and fifty-one and 50/100 dollars ($5,951.50); that no part of said sum has been paid, and that said sum constitutes in favor of said complainant a just liability of said State Dispensary, and, by reason of the matters and things hereinbefore alleged, and particularly by the terms of said Act of February 16, 1907, last above mentioned, said fund in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants, Murray, McSween, Arthur, Henderson and Patton were, and are, charged with the ministerial duty to pay the same to said complainant.

12.

And your orators further show, that, as they are informed and believe, the defendants, Murray, McSween, Arthur, Henderson and Patton, have received from the sale of the property of the said Dispensary and the collections of debts due it, and now have in their hands, on deposit in the defendant Banks and other Depositories, a large sum of money, amounting to eight hundred thousand dollars ($800,000) or thereabouts, and that said sum, if properly preserved and applied, will be amply sufficient to pay off and discharge the claims of your orators,

(162) and all other just liabilities of said State Dispensary, which said liabilities do not, as your orators are informed and believe, exceed the sum of six hundred and nine thousand dollars ($609,000.00), all which facts will more fully appear from the report made by said defendants to the Governor of the State of South Carolina, on or about the fourth day of January, 1908, to which report reference is hereby made.

13.

And your orators further show that as they are informed, advised and believe, the money received by the defendants, Murray, McSween, Arthur, Henderson and Patton, and held by them as hereinbefore alleged, having been placed in their possession for the specific purpose of paying all the just liabilities of the said State Dispensary, became, and now constitutes a trust fund in the hands of said defendants, and the said defendants hold the same as trustees for your orators, and the other creditors of the said State Dispensary, and said defendants became, were and are charged with the ministerial duty of paying all said just liabilities of said State Dispensary to your orators and to the other persons, firms, corporations and associations respectively entitled thereto.

14.

And your orators further show that all the money realized from the sale of the property of the said State Dispensary and the collection of debts due to it, pursuant to the provisions of the Act aforesaid, has been from time to time, as received by the defendants constituting the State Dispensary Commission, and now is, deposited to the credit of said Commission in the defendant Banks and other depositories in the State of South Carolina, subject to withdrawal only by said Commission, and no part of said money is in the treasury of the State of South Carolina, or has ever been mingled with any funds belonging to said State.

15.

(163) And your orators further show that said defendants, Murray, McSween, Arthur, Henderson and Patton, have abused and are abusing the trusts reposed in them as aforesaid in manner and the particulars following, that is to say:

(*a*) They have wrongfully and unlawfully failed and refused to pay the just claims of your orators and of other per-

sons, firms and corporations having just claims against the said State Dispensary and in and upon said trust funds, and have wrongfully and unlawfully failed and refused to pay the just liabilities of said State Dispensary at the earliest date practicable, as required by said Act of February 16, 1907.

(*b*) They have unlawfully, and for the wrongful purpose of avoiding, delaying and defeating the payment of the just liabilities of the said State Dispensary, denied their said trust, and denied that they owed any duty to the creditors of the said State Dispensary.

(*c*) They have wrongfully and unlawfully exceeded the powers conferred upon them by law and have usurped and presumed to exercise the powers of a court and have unlawfully attempted to arrogate to themselves exclusive jurisdiction of all claims against said State Dispensary and against the funds in their hands.

(*d*) The powers and functions so unlawfully and wrongfully usurped by them they have exercised in a partial, unfair and oppressive manner, and the hearings and proceedings had by them upon the claims of persons, firms and corporations who allege themselves to be creditors of said State Dispensary and to be entitled to share in said fund have not been designed chiefly, if at all, to ascertain the just liabilities of said State Dispensary, but have had for their principal purpose the provision of some more or less plausible excuse for refusing to pay the just liabilities of said State Dispensary and the procurement of evidence to be used by the Attorney General of said (164) State in his proposed criminal prosecutions of alleged dispensary grafters, so-called, and in furtherance of this latter design they have wrongfully required the attendance of non-resident persons as witnesses upon claims against said fund with the sole or principal object of enabling such Attorney General to have criminal process executed upon said persons while within the jurisdiction of said State in obedience to said requirement, and they have knowingly and wrongfully acquiesced in the wrongful refusal of the said Attorney-General to grant immunity from arrest to said non-resident persons while present in said State in obedience to said requirement, and at the same time have wrongfully refused to pass upon or allow such claims without the personal presence of such non-resident persons at their hearings within said State.

(*e*) They are wrongfully seeking, or they wrongfully acquiesce in other persons seeking for them, an amendment to

said Act of 1907, having for its purpose the legalizing of their usurpations of the powers and functions of a court, and their wrongful claim of exclusive original jurisdiction, as such court, of all claims against said Dispensary and against said fund in their hands, as aforesaid.

(*f*) They wrongfully seek, by the usurpations aforesaid and through the proposed legislation aforesaid, to place said funds beyond the reach of this court and every other regularly organized court of general jurisdiction, and thereby render it impossible for your orators and other persons having just claims against said State Dispensary and against said fund to realize anything upon their said claims, through any legal proceedings, or otherwise, except such amounts as they, in the exercise of the alleged exclusive jurisdiction aforesaid, may be pleased to allow to them.

(*g*) They deny the right of your orators and other persons having just claims against said Dispensary and against said fund to have their said claims litigated in a court of general jurisdiction, and are attempting, through the proposed legisla-
(165) tion aforesaid, to make such denial effectual.

And all and every the unlawful and wrongful acts and doings aforesaid they still continue and threaten to do, to the great wrong and irreparable injury of your orators.

16.

And your orators further show that said defendants, by their conduct and usurpations aforesaid, and through the proposed legislation aforesaid, seek to deny to your orators and all other persons having just claims against said State Dispensary and against said fund, the right of trial by jury guaranteed by the Constitution of the State of South Carolina; and they further seek to deprive your orators, and all other persons having just claims against said State Dispensary and against said fund, of their property without due process of law, and to deny to them the equal protection of the laws, in violation of their rights under the Constitution of the United States, and Article XIV., section 1, of the Amendments thereof, the protection whereof is hereby expressly claimed by your orators.

17.

And your orators further show that there are a large number of persons claiming to be creditors of the said State Dispensary and seeking to collect from the defendants various

sums ranging in amount from one, or a few, to many thousands of dollars; that some of said persons, for the purpose of compelling the payment of their debts, have already brought suit against said defendants, and others are, as your orators are informed and believe, threatening to institute similar actions; and if said defendants shall be required or permitted to defend a multiplicity of said suits in order to determine the validity of each claim against them, and shall be allowed to defer the payment of all claims until the final termination of said suits, a large part of the funds in their hands will be wasted in ex-
(166) pensive litigation and court costs, and a great wrong, injustice and injury will be done to your orators, and to all other persons having just claims against said State Dispensary and against said fund.

18.

Each and every allegation of fact in this bill of complaint contained is made upon the information and belief of the solicitor for the complainant by whom the same is verified.

19.

This suit is brought by your orators on their own behalf and on behalf of all other persons having just claims against said State Dispensary and against said fund in the hands of said defendants, who may hereafter desire to join herein and to contribute to the expenses hereof.

In consideration whereof, and for as much as your orators are without remedy and can obtain adequate relief only in a court of equity, and to the end that the defendants may be prevented from committing further wrongs and trespasses against the rights of your orators, and for the purpose of preserving the fund in the hands of the defendants and of enforcing the rights and equities of your orators in the same, and preventing further waste, loss and damage by reason of the facts alleged in this bill, your orators pray:

(1) That this Honorable Court will forthwith appoint a receiver to take charge of and administer as a trust fund all the money now in the hands of the defendants arising out of the sale of property belonging to said State Dispensary of South Carolina, or from the collection of debts due it.

(2) That the defendants, their agents, servants, attorneys, employees and depositaries, be restrained and enjoined from disposing of or paying out, or in any manner interfering further
(167) with the said fund or any part thereof, except to transfer the same to the receiver appointed by the court.

(3) That it be referred to a Master to ascertain and determine the amount due to your orators and other creditors upon their claims against the said State Dispensary and against said fund in the hands of said defendants, and that a decree be entered ordering and directing that the amounts so found to be due be immediately paid to your orators respectively. That the defendants be required to set forth an account of all and every sum or sums of money received by them, or either of them, or which ought to have been received by them, or which has been received by any person or persons by their or either of their orders, or for their or either of their use, from the sale of any property of said State Dispensary or the collection of any debt or debts due to it, and when and from whom, and from what in particular, all and every such sums were respectively received, and where deposited and held, and how the same, respectively, have been applied or disposed of.

And that your orators have such other and further relief in the premises as the nature of the circumstances of the case may require, and as to the court may seem meet and proper.

And may it please your honors to grant unto your orators a writ of injunction conformable to the prayer of this bill, and also a writ of subpœna directed to all the defendants not heretofore served with subpœna commanding them, and each of them, to appear and answer this bill of complaint, but not under oath, discovery and answer under oath being hereby expressly waived as to all and every of the defendants herein, and to stand to, perform and abide such orders, directions and decrees in the premises as to the court shall seem meet or be required by the principles of equity and good conscience.

(Signed) T. MOULTRIE MORDECAI,
" FRANK CARTER and
H. C. CHEDESTER,
Solicitors for Complainants.

Verification of Bill of Complaint.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

(168)

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.

Frank Carter, being sworn, says that he is one of the solicitors for the complainants in the above entitled suit, and that he

verifies this amended and supplemental bill of complaint herein on behalf of said complainants; that said verification is made by this affiant for the reason that said Wilson Distilling Company and said Anheuser-Busch Brewing Association are foreign corporations, and that no officer or agent of said corporations, or either of them, capable of making said verification is present within the district of South Carolina, or at the place where said bill of complaint was prepared, to the knowledge or belief of this affiant, and that said Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, and John M. Cranston, trading as Jack Cranston Company, are non-residents of the State and District of South Carolina, and neither of said parties is present within said District of South Carolina, or at the place where said bill of complaint was prepared, to the knowledge or belief of this affiant; that the foregoing bill of complaint is true of his own knowledge, except as to those matters therein (169) stated upon information and belief, and as to those matters he believes it to be true.

(Signed) FRANK CARTER.

Sworn to and subscribed before me this the 19th day of February, 1908.

(Signed) JOSEPH P. BRADY,
Clerk U. S. Circuit Court for the Eastern District of Virginia.

Upon the back of said Amended and Supplemental Bill of Complaint appears the following endorsement:

"Filed by leave of court this February 19th, 1908.

"(Signed) J. C. PRITCHARD,
"U. S. Circuit Judge."

Sub. ad Re.

(170) Filed Feb. 24, 1908.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

The President of the United States of America to The National Loan and Exchange Bank, of Columbia, South Carolina; The Palmetto National Bank, of Columbia, South Carolina; The Columbia Savings and Trust Company, of Columbia, South Carolina; The Bank of Timmonsville, of Timmonsville, South Carolina; The People's Bank of Union, of Union, South Carolina; The Bank of Aiken, of Aiken, South Carolina; The Piedmont Savings and Investment Company, of Greenville, South Carolina; The Merchants' and Farmers' Bank, of Cheraw, South Carolina; and the Bank of Camden, Camden, South Carolina, Defendants:

You are hereby strictly commanded and firmly enjoined that all manner of excuses being laid aside, you be and appear before the Judges of the Circuit Court of the United States for the District of South Carolina, at Charleston, on Monday, the sixth day of April, 1908, twenty days after the service thereof; then and there true and perfect answer to make upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the Amended and Supplemental Bill of Complaint of Wilson Distilling Company, a body corporate under the laws of the State of New Jersey and a citizen and resident of said State; Anheuser-Busch Brewing Association, a body corporate under the laws of the State of Missouri and a citizen and resident of said State; Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, citizens and residents of the State of Pennsylvania; and John M. Cranston, trading as Jack Cranston Company, a citizen and resident of the State of Georgia.

And, also, That you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the Registry of said Court, your plea, answer or demurrer,
(171) to the said bill of complaint.

Herein fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in the District aforesaid, the 24th day of February, in the year of our Lord

one thousand nine hundred and eight, and in the one hundred and thirty-second year of the Sovereignty and Independence of the United States of America.

T. MOULTRIE MORDECAI,
FRANK CARTER and
H. C. CHEDESTER,
[Seal of Court] Complainant's Solicitors.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit, in the Clerk's Office of the Circuit Court of the United States for the District of South Carolina, on or before the first Monday of April, 1908, otherwise the bill will be taken *pro confesso* against you.

C. J. MURPHY,
[Seal] C. C. C., U. S. Dist. of S. C.

Order to Show Cause.

(172) Filed Feb. 24, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON. IN EQUITY.

Wilson Distilling Co. et al., Complainants,
vs.
W. J. Murray et al., Defendants.

Upon considering the amended and supplemental bill of complaint this day filed in the above entitled cause, it is now, on motion of the solicitors for the complainants, ordered and adjudged that the defendants be and appear before the undersigned Judge, at his chambers, in Asheville, North Carolina, at 10 o'clock A. M., on the 29th day of February, 1908, and show cause, if any they have, why the relief prayed for in said bill shall not be granted, and why a Receiver shall not be appointed and injunction issued as therein prayed.

Let a copy of this order, together with a copy of said amended and supplemental bill of complaint, be forthwith served upon each of the defendants.

This the 19th day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(173) I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause and sub. ad re. on the therein-named W. J. Murray by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 24 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(174) I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named John McSween by handing to and leaving a true and correct copy thereof with him personally at Columbia, S. C., in said district, on the 25 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(175) I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, or-

der to show cause & sub. ad re. on the therein-named B. F. Arthur, personally & upon The Peoples Bank of Union, S. C., by handing to and leaving a true and correct copy thereof with B. F. Arthur, president, personally, at Union, S. C., in said district, on the 26 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. H. McLANE, Deputy.

Sworn to before me this 28th Feby., 1908.

J. B. ATKINS,
[Seal] U. S. Comm'r.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(176) I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named C. K. Henderson by handing to and leaving a true and correct copy thereof with him personally at Aiken, S. C., in said district, on the 25 day of Feby., A. D., 1908, 9:30 a. m.

J. DUNCAN ADAMS,
U. S. Marshal.
By M. W. HUDGENS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(177)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named Avery Patton by handing to and leaving a true and correct copy thereof with him personally at Greenville, S. C., in said district, on the 24 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of So. Ca. } *ss:*

(178)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named National Loan & Exchange Bk. by handing to and leaving a true and correct copy thereof with G. M. Berry, cashier, personally at Columbia, S. C., in said district, on the 24 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(179)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named Palmetto National Bank by handing to and leaving a true and correct copy thereof with W. M. Gibbes, Jr., Assistant Cashier, personally at Columbia, S. C., in said district, on the 24 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(180)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named Columbia Savings Bank & Trust Company by handing to and leaving a true and correct copy thereof with A. R. Heyward, president, personally at Columbia, S. C., in said district, on the 24 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(181)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named Bank of Timmonsville, S. C., by handing to and leaving a true and correct copy thereof with John McSween, president, personally at Columbia, S. C., in said district, on the 25 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(182)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named Piedmont Savings & Investment Co., by handing to and leaving a true and correct copy thereof with Frank Capers, president of said company, personally at Greenville, S. C., in said district, on the 24 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(183)

I hereby certify and return that I served the annexed amended bill of complaint, order to make new defendants, order to show cause & sub. ad re. on the therein-named Merchants & Farmers Bank, Cheraw, S. C., by handing to and leaving a true and correct copy thereof with W. F. Stevenson, president, personally at Columbia, S. C., in said district, on the 25 day of Feby., A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Order Allowing Jack Cranston Co. to Intervene as a Party Complainant.

(184) Filed February 24th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants. } In Equity.

ORDER.

John M. Cranston, trading as Jack Cranston Company, having appeared by his solicitors, T. Moultrie Mordecai and Frank Carter & H. C. Chedester, and moved for leave to intervene as a party complainant in this cause;

It is ordered that said John M. Cranston, trading as Jack Cranston Company, have leave to intervene as a party complainant herein and that he be, and he hereby is made such party complainant.

This the 19th day of February, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of Big Springs Distilling Co. to Intervene and Order Allowing Same.

(185) Filed Feb. 26, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

PETITION.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina.

The petition of Big Spring Distilling Company, respectfully shows:

1. That it is a corporation duly incorporated under the laws of the State of Georgia, having its principal office at Savannah, Georgia.

2. That heretofore during the year 1907 and up to October, 1907, your orator sold to the State Dispensary of South Carolina, through its directors who were the proper officers authorized by law to purchase wines and liquors for said Dispensary to the amount and value of $25,006.78 and your orator shipped said goods to the State Dispensary and the same were accepted by it through its duly authorized officer and as your orator is informed and believes the same were sold by said Dispensary at a large profit. That an invoice and account of the goods so sold and delivered were duly rendered by your orator to said State Dispensary through its proper officers and agents and that the same was duly accepted and approved, and the amount thereof became due to your orator as upon an account stated. That no part of the price of said whiskies and liquors has ever been paid and the whole thereof is justly due to the

complainant by said State Dispensary at the time of the appointment of said Commission, and still is justly due it. That the whiskey and liquors so sold to the said Dispensary were reasonably worth the sum of $25,006.78.

3. That your orator is entitled to be paid said sum out of the funds described in the petition filed in the above named (186) cause. That it has an interest in the subject of said cause and it is necessary for it to intervene in said cause to protect its right and interest in the said subject matter. That said dispensary commissioners have refused to pay said sums.

4. That your orator is desirous of intervening in the above stated cause in order to protect its respective interests and to be made parties complainant therein. It adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be meet and proper in the premises.

Whereupon, it prays that this intervention be allowed that it be made a party plaintiff in said cause and that this intervention be filed as a part of the record in said cause, and that it be granted all the relief prayed for by the complainant in the original bill.

(Signed) OSBORNE and LAWRENCE,
Solicitors for Pet'r.

STATE OF GEORGIA,
Chatham County.

(187) On this the 19th day of February, 1908, before me, personally appeared E. F. O'Connor, who being first duly sworn, says that he is an officer of the intervening corporation, the Big Spring Distilling Company, to-wit: Its Secretary and Treasurer, and makes this affidavit in its behalf that he has read the foregoing petition or bill for intervention and knows the contents thereof, that the same is true, according to his own knowledge, except as to those matters therein stated upon information and belief and as to those matters he believes it to be true.

(Signed) E. F. O'CONNOR,

Sworn to and subscribed before me this 19th, 1908.

(Signed) SIMON N. GAGAN,
N. P. C. C. Ga.

(188) Upon reading the petition of Big Spring Distilling Company, a corporation of Savannah, Georgia, who appears through its counsel and asks and seeks to be made parties complainant herein intervening for that purpose, it is ordered that it be, and it is hereby permitted to intervene and it is hereby made a party complainant herein and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 21st day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of Ullman & Co. to Intervene and Order Allowing Same

(189) Filed Feb. 26, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

PETITION.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina.

The petition of Ullman and Company respectfully shows:

1. That it is a partnership composed of Adolph Ullman and L. C. Strauss of Cincinnati, Ohio, doing business in Cincinnati, Ohio.

2. That heretofore during the year 1907 and prior thereto your petitioner sold to the State Dispensary of South Carolina, through its directors who were the proper officers author-

ized by law to purchase wines and liquors for said Dispensary, wines and liquors to the amount and value of $35,339.67 and your petitioner shipped said goods to the State Dispensary, and the same were accepted by it through its duly authorized officers, and as your petitioner is informed and believes, the same were sold by the said Dispensary at a large profit. That an invoice and account of the goods so sold and delivered were duly rendered by your petitioner to said State Dispensary through its proper officers and agents. That the price of said goods was agreed upon between the officers of said Dispensary and your petitioner. That no part of the price of said whiskies and liquors has ever been paid, and the whole thereof is justly due to petitioner by said State Dispensary at the time of the appointment of the Commission described in the original bill filed in said case and still is justly due. That they whiskey and liquors so sold to the said Dispensary were reasonably worth the said sum of $35,339.67.

(190) 3. That your petitioner is entitled to be paid said sum of the fund described in the original petition filed in the above named cause. That it has an interest in the subject matter of said cause, and it is necessary for it to intervene in said cause to protect its right and interest in the said subject matter. That payment has been refused.

4. That your petitioner is desirous of intervening in the above stated cause in order to protect its respective interests and to be made a party complainant therein. It adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be meet and proper in the premises.

Whereupon, petitioner prays that this intervention be allowed, that it be made a party plaintiff in said cause and that this intervention be filed as a part of the record in said cause and that it be granted all the relief prayed for by the complainant in the original bill.

(Signed) NELSON & NELSON,
(Signed) OSBORNE & LAWRENCE,
Solicitors for Petitioner.

STATE OF VIRGINIA,
Henrico County.

On this, the 20th day of February, 1908, before me personally appeared M. A. Goodman, who being first duly sworn,

says that he is an agent of the intervening partnership Ullman & Company, and makes this affidavit in its behalf; that he has read the foregoing petition or bill for intervention and knows the contents thereof, that the same is true according to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) M. A. GOODMAN.

Sworn to and subscribed before me this February 20th, 1908.

(Signed) E. LESLIE SPENCER, JR.,
Notary Public.

(191) Upon reading and considering the petition of Ullman & Company of Cincinnati, Ohio, who appear through counsel and ask and seek to be made party complainant herein, intervening for that purpose, it is ordered that it be and it is hereby permitted to intervene and it is hereby made a party complainant herein and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 21st day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of Anchor Distilling Co. to Intervene and Order Allowing Same.

(192) Filed Feb. 26, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

PETITION.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina.

The petition of Anchor Distilling Company respectfully shows:

1. That it is doing business in Cincinnati, Ohio.

2. That heretofore during the year 1907 and prior thereto your petitioner sold to the State Dispensary of South Carolina, through its directors who were the proper officers authorized by law to purchase wines and liquors for said Dispensary, wines and liquors to the amount and value of $1,914.31, and your petitioner shipped said goods to the State Dispensary and the same was accepted by it through its duly authorized officers and as your petitioner is informed and believes, the same were sold by said Dispensary at a large profit. That an invoice and account of the goods so sold and delivered were duly rendered by your petitioner to said State Dispensary through its proper officers and agents. That the price of said goods was agreed upon between the officers of said Dispensary and your petitioner. That no part of the price of said whiskies and liquors has ever been paid, and the whole thereof is justly due to petitioner by said State Dispensary at the time of the appointment of the Commission described in the original bill filed in said

case, and still is justly due. That the whiskey and liquors so sold to the said Dispensary were reasonably worth the said sum of $1,914.31.

(193) 3. That your petitioner is entitled to be paid said sum out of the fund described in the original petition filed in the above named cause. That is has an interest in the subject matter of said cause and it is necessary for it to intervene in said cause to protect its right and interest in the said subject matter. That payment has been refused.

4. That your petitioner is desirous of intervening in the above stated cause in order to protect its respective interests and to be made a party complainant therein. It adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be meet and proper in the premises.

Whereupon, petitioner prays that this intervention be allowed, that it be made a party plaintiff in said cause, and that this intervention be filed as a part of the record in said cause and that it be granted all the relief prayed for by the complainant in the original bill.

(Signed) NELSON & NELSON,
(Signed) OSBORNE & LAWRENCE,
Solicitors for Petitioner.

STATE OF VIRGINIA,
Henrico County.

On this, the 20th day of February, 1908, before me personally appeared M. A. Goodman, who being first duly sworn, says that he has read the foregoing petition or bill for intervention and knows the contents thereof, that the same is true according to his own knowledge, except as to those matters therein stated upon information and belief and as to those matters he believes it to be true.

(Signed) M. A. GOODMAN.

Sworn to and subscribed before me this February 20th, 1908.

(Signed) E. LESLIE SPENCER, JR.,
Notary Public.

(194) Upon reading and considering the petition of Anchor Distilling Company of Cincinnati, Ohio, who appear through

counsel and ask and seek to be made party complainant herein, intervening for that purpose, it is ordered that it be and is hereby permitted to intervene and it is hereby made a party complainant herein and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 21st day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of Belair Distilling Company to Intervene and Order Allowing Same.

(195) Filed Feb. 26, 1908. ,

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

PETITION.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina.

The petition of Belair Distilling Company respectfully shows:

1. That it is a corporation incorporated under the laws of Virginia, doing business in Baltimore, Maryland.

2. That heretofore during the year 1907 and prior thereto your petitioner sold to the State Dispensary of South Carolina, through its directors who were the proper officers authorized by law to purchase wines and liquors for said Dispensary, wines

and liquors to the amount and value of $6,386.41 and your petitioner shipped said goods to the State Dispensary and the same were accepted by it through its duly authorized officers and as your petitioner is informed and believes, the same were sold by said Dispensary at a large profit. That an invoice and account of the goods so sold and delivered were, duly rendered by your petitioner to said State Dispensary through its proper officers and agents. That the price of said goods was agreed upon between the officers of said Dispensary and your petitioner. That no part of the price of said whiskies and liquors has ever been paid, and the whole thereof is justly due to petitioner by said State Dispensary at the time of the appointment of the Commission described in the original bill filed in said case and still is justly due. That they whiskey and liquors so sold to the said Dispensary were reasonably worth the said sum of $6,386.41.

(196)

3. That your petitioner is entitled to be paid said sum out of the fund described in the original petition filed in the above named cause. That it has an interest in the subject matter of said cause, and it is necessary for it to intervene in said cause to protect its right and interest in the said subject matter. That payment has been refused.

4. That your petitioner is desirous of intervening in the above stated cause in order to protect its respective interests and to be made a party complainant therein. It adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be meet and proper in the premises.

Whereupon, petitioner prays that this intervention be allowed, that it be made a party plaintiff in said cause and that this intervention be filed as a part of the record in said cause and that it be granted all the relief prayed for by the complainant in the original bill.

(Signed) OSBORNE & LAWRENCE,
Solicitors for Petitioner.

STATE OF VIRGINIA,
Henrico County.

(197) On this, the 20th day of February, 1908, before me personally appeared S. A. Nathans, who being first duly sworn, says that he is vice-president and treasurer of Belair Distilling Company, that he is authorized to make this affidavit and that he has read the foregoing petition or bill for intervention and

knows the contents thereof, that the same is true according to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) S. A. NATHANS.

Sworn to and subscribed before me this February 20th, 1908.

(Signed) E. LESLIE SPENCER, JR.,
Notary Public.

Upon reading and considering the petition of Belair Distilling Company, who appear through counsel and ask and seek to be made party complainant herein, intervening for that purpose it is ordered that it be and it is hereby permitted to intervene and it is hereby made a party complainant herein and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 21st day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of Richard & Co. to Intervene and Order Allowing Same

(198) Filed Feb. 26, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Com-
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

PETITION.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina.

The petition of Richard & Company respectfully shows:

1. That it is a partnership composed of Edward Richard, Joseph Schiffman and Salvador S. Richard, doing business in

Washington, D. C., as co-partners under the name and style of Richard & Company.

2. That heretofore during the year 1907 and prior thereto your petitioner sold to the State Dispensary of South Carolina, through its directors who were the proper officers authorized by law to purchase wines and liquors for said Dispensary, wines and liquors to the amount and value of $1,775.50 and your petitioner shipped said goods to the State Dispensary and the same were accepted by it through its duly authorized officers and as your petitioner is informed and believes, the same were sold by said Dispensary at a large profit. That an invoice and account of the goods so sold and delivered were, duly rendered by your petitioner to said State Dispensary through its proper officers and agents. That the price of said goods was agreed upon between the officers of said Dispensary and your petitioner. That no part of the price of said whiskies and liquors has ever been paid, and the whole thereof is justly due to petitioner by said State Dispensary at the time of the appointment of the Commission described in the original bill filed in said case and still is justly due. That they whiskey and liquors so sold to the said Dispensary were reasonably worth the said sum of $1,-775.50.

(199)

3. That your petitioner is entitled to be paid said sum out of the fund described in the original petition filed in the above named cause. That it has an interest in the subject matter of said cause, and it is necessary for it to intervene in said cause to protect its right and interest in the said subject matter. That

4. That your petitioner is desirous of intervening in the above stated cause in order to protect its respective interests and to be made a party complainant therein. It adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be meet and proper in the premises.

Whereupon, petitioner prays that this intervention be allowed, that it be made a party plaintiff in said cause and that this intervention be filed as a part of the record in said cause and that it be granted all the relief prayed for by the complainant in the original bill.

(Signed) OSBORNE & LAWRENCE,
Solicitors for Petitioner.

STATE OF VIRGINIA,
Henrico County.

(200) On this, the 20th day of February, 1908, before me personally appeared Salvador S. Richard, who being first duly sworn, says that he is a partner in the firm of Richard & Company and is authorized to make this affidavit and that he has read the foregoing petition or bill for intervention and knows the contents thereof that the same is true according to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) SALVADOR S. RICHARD.

Sworn to and subscribed before me this February 20th, 1908.

(Signed) E. LESLIE SPENCER, JR.,

Upon reading and considering the petition of Richard & Company who appear through counsel and ask and seek to be made party complainant herein, intervening for that purpose, it is ordered that it be and it is hereby permitted to intervene and it is hereby made a party complainant herein and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 21st day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of D. Sachs & Sons to Intervene and Order Allowing Same.

(201) Filed March 2nd, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina.

The petition of D. Sachs & Sons, respectfully shows:

1. That it is a partnership composed of M. D. Sachs, E. Sachs and S. Haas, doing business under the firm name of D. Sachs & Sons, in the City of Louisville, in the State of Kentucky.

2. That heretofore during the year 1906, your petitioner sold to the State Dispensary of South Carolina, through its directors who were the proper officers authorized by law to purchase wines, liquors for said Dispensary, wines and liquors to the amount and value of $9,198.33, and your petitioner shipped said goods to the State Dispensary, and the same were accepted by it through its duly authorized officers, and as your petitioner is informed and believes, the same were sold by said Dispensary at a large profit. That an invoice and account of the goods so sold and delivered were duly rendered by your petitioner to said State Dispensary through its proper officers and agents. That the price of said goods was agreed upon between the officers of said Dispensary and your petitioner. That no part of the price of said whiskies and liquors has ever been (202) paid, and the whole amount thereof is justly due to petitioner by said State Dispensary at the time of the appointment of the Commission described in the original bill filed in

said case and still is justly due. That the whiskey and liquors so sold to the said Dispensary were reasonably worth the said sum of $9,198.33.

3. That your petitioner is entitled to be paid said sum out of the fund described in the original petition filed in the above named cause, and it is neccessary for it to intervene in said cause to protect its right and interest in the said subject matter. That payment has been refused.

4. That your petitioner is desirous of intervening in the above stated cause in order to protect its respective interests and to be made a party complainant therein. It adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be mete and proper in the premises.

Whereupon, petitioner prays that this intervention be allowed, that it be made a party plaintiff in said cause, and that this intervention be filed as a part of the record in said cause, and that it be granted all the relief prayed for by the complainant in the original bill.

NELSON & NELSON,
Attys. for Petitioner D. Sachs & Sons.

STATE OF SOUTH CAROLINA,
County of Richland.

Before me personally appeared P. H. Nelson, who, being duly sworn, says: That he is the senior member of the law firm of Nelson & Nelson, who are the attorneys of the intervening partnership of D. Sachs & Sons, and that he verifies the foregoing petition or bill for intervention on behalf of deponent for the reason that no member of said firm or agent is present within the District of South Carolina to the knowledge of this deponent at the time the foregoing petition or bill for intervention was prepared: That the foregoing petition or bill for intervention is made upon knowledge and information conveyed to him by the said D. Sachs & Sons, and upon such information as to these matters he believes it to be true.

P. H. NELSON.

Sworn to and subscribed before me this 28th day of February, 1908.

[Seal]

J. TEAM GETTYS,
Notary Public for South Carolina.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
(203)

In Equity.

ORDER.

Upon reading and considering the petition of D. Sachs & Sons of Louisville, Kentucky, who appear through counsel and ask and seek to be made party complainant herein, intervening for that purpose.

It is ordered

That it be and it is hereby permitted to intervene and it is hereby made a party complainant and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 29th day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

Order Continuing Injunction.

(204) Filed March 2nd, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

The Wilson Distilling Company et al., Complainants,

vs.

W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Company, The Bank of Timmonsville, The Peoples Bank of Union, The Bank of Aiken, The Piedmont Savings & Investment Company, The Merchants and Farmers Bank and the Bank of Camden, Defendants.

Pursuant to the order of the court heretofore issued, this cause came on to be heard, counsel for the respondents asking for further time to make their return to the rule to show cause, it is

Ordered, that Saturday, the 7th day of March, 1908, at 10 o'clock in the forenoon at Asheville, North Carolina, is hereby set for the filing and service of such return and the hearing of the rule thereupon why a receiver should not be appointed and for the other relief prayed in the bill.

Upon application of the counsel for the defendants, said defendants are allowed until rules day in April, 1908, at 10 (205) o'clock in the forenoon to plead, answer, or demur to amended or supplemental bill of complaint herein, on which date the cause it set for hearing.

It is now, upon motion of T. Moultrie Mordecai, Frank Carter and H. C. Chedester, attorneys for the complainants,

Ordered, adjudged and decreed by the court that the order heretofore issued in this cause restraining and enjoining the above named defendants from intervening with, paying out or transferring to any person or persons whomsoever or in any

way disturbing or changing the present status of the funds in the control and possession of the South Carolina State Dispensary Commission and in part deposited with the other defendants herein, and from taking any steps with reference to said fund tending to or which may put said funds beyond the jurisdiction of this court, be and the same is hereby continued of force until the further order of this court, and the motion of the complainants for the appointment of a receiver of said fund is hereby continued until Saturday, the 7th day of March, 1908, at 10 o'clock in the forenoon at Asheville.

Dated the 29th day of February, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Order Making Certain Banks Parties Defendant and Restraining Order.

(206) Filed March 5th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants. } Order.

It having been suggested to the court that the fund in controversy in this action is held by the defendants composing the State Dispensary Commission, in part, on deposit in the hereinafter named Banks,

It is now, upon motion of T. Moultrie Mordecai and Frank Carter and H. C. Chedester, solicitors for the complainants, considered, ordered and adjudged that "The State Bank, of Columbia, S. C., The Bank of Charleston, of Charleston, S. C., The Peoples Loan and Exchange Bank, of Laurens, S. C., The Bank of Orangeburg, of Orangeburg, S. C., The National Exchange Bank, of Chester, S. C., The Commercial Bank of Camden, S. C., The Peoples Savings Bank of Abbeville, S. C., The City National Bank, of Greenville, S. C., The Greenville Savings and Trust Co., of Greenville, S. C., The Lexington Savings Bank, of Lexington, S. C., The Peoples National Bank, of Charleston, S. C., The Peoples Bank, of Greenville, S. C., The Norwood National Bank of Greenville, S. C., The

Merchants and Farmers Bank, of Spartanburg, S. C., The First National Bank, of Spartanburg, S. C., The Central National Bank of Spartanburg, S. C., The Bank of Dillon, Dillon, S. C., The Enterprise Bank of Charleston, S. C., The Merchants & Planters Bank of Gaffney, S. C., The Farmers & Merchants Bank of Anderson, S. C., The Farmers and Merchants Bank of Walterboro, S. C., The Commercial & Savings Bank, of Florence, S. C., The Bank of Hartsville, of Hartsville, S. C., all bodies corporate, residents and citizens of the State of South (207) Carolina, be, and they and each of them hereby are made parties defendant in this cause, and it is hereby ordered that subpœnas issue for said parties according to the course and practice of this court.

And it is further ordered, adjudged and decreed that all and every of the defendants be, and they and each of them hereby are restrained and enjoined from interfering with, paying out or transferring to any person or persons whomsoever, or in any way disturbing or changing the present status of the funds in the possession or control of the said South Carolina State Dispensary Commission, and deposited, in whole or in part, with the other defendants, and from taking any steps with reference to said fund, tending to, or which may put said funds or any part thereof, beyond the jurisdiction of this court, until the further order of this court.

Let a copy of this order, together with a copy of the amended and supplemental bill of complaint herein be forthwith served upon each of the defendants not heretofore served, and above named.

This the 3rd day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Sub. ad Re.

(208) Filed March 6th, 1908.

UNITED STATES OF AMERICA,
Fourth Circuit.
District of South Carolina.

The President of the United States of America to The National Loan and Exchange Bank, of Columbia, South Carolina; The Palmetto National Bank, of Columbia, South Carolina; The Columbia Savings and Trust Company, of Columbia, South Carolina; The Bank of Timmonsville, of Timmonsville, South Carolina; The People's Bank of Union, of Union, South Carolina; The Bank of Aiken, of Aiken, South Carolina; The Piedmont Savings and Investment Company, of Greenville, South Carolina; The Merchants and Farmers Bank, of Cheraw, South Carolina; and the Bank of Camden, Camden, South Carolina; The State Bank of Columbia, S. C., The Bank of Charleston, of Charleston, S. C.; The Peoples Loan and Exchange Bank, of Laurens, S. C.; The Bank of Orangeburg, of Orangeburg, S. C.; The National Exchange Bank, of Chester, S. C.; The Commercial Bank, of Camden, S. C.; The Peoples Savings Bank of Abbeville, S. C.; The City National Bank, of Greenville, S. C.; The Greenville Savings and Trust Co., of Greenville, S. C.; The Lexington Savings Bank, of Lexington, S. C.; The Peoples National Bank, of Charleston, S. C.; The Peoples Bank, of Greenville, S. C.; The Norwood National Bank, of Greenville, S. C.; The Merchants and Farmers Bank, of Spartanburg, S. C.; The First National Bank of Spartanburg, S. C.; The Central National Bank of Spartanburg, S. C.; The Bank of Dillon, of Dillon, S. C.; The Enterprise Bank, of Charleston, S. C.; The Merchants and Planters Bank of Gaffney, S. C.; The Farmers & Merchants Bank, of Anderson, S. C.; The Farmers and Merchants Bank, of Walterboro, S. C.; The Commercial and Savings Bank, of Florence, S. C.; The Bank of Hartsville, of Hartsville, S. C., Defendants:

You are hereby strictly commanded and firmly enjoined that all manner of excuses being laid aside, you be and appear before the Judges of the Circuit Court of the United States (209) for the District of South Carolina, at Charleston, on Monday, the sixth day of April, 1908, twenty days after the service thereof; then and there true and perfect answer to make

upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the amended and supplemental bill of complaint of Wilson Distilling Company, a body corporate under the laws of the State of New Jersey and a citizen and resident of said State; Anheuser-Busch Brewing Association, a body corporate under the laws of the State of Missouri and a citizen and resident of said State; Charles J. Gallagher, Jr., and Edward Burton, partners, as Gallagher & Burton, citizens and residents of the State of Pennsylvania; and John M. Cranston, trading as Jack Cranston Company, a citizen and resident of the State of Georgia.

And, also, That you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the Registry of said Court, your plea, answer or demurrer, to the said bill of complaint.

Herein fail not, under the pain of one hundred pounds.

Given under the said of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in the District aforesaid, the 5th day of March, in the year of our Lord one thousand nine hundred and eight, and in the one hundred and thirty-second year of the Sovereignty and Independence of the United States of America.

T. MOULTRIE MORDECAI,
FRANK CARTER and
H. C. CHEDESTER,
Complainant's Solicitors.

[Seal of Court]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit, in the Clerk's Office of the Circuit Court of the United States for the District of South Carolina, on or before the first Monday of April, 1908, otherwise the bill will be taken *pro confesso* against you.

C. J. MURPHY,
C. C. C. U. S. Dist. S. C.

[Seal]

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(210)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The State Bank by handing to and leaving a true and correct copy thereof with J. T. Melton, cashier, personally at Columbia, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(211)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named Bank of Charleston, by handing to and leaving a true and correct copy thereof with E. H. Pringle, president, personally at Charleston, S. C., in said district, on the 7th day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. L. ADAMS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(212)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Peoples Loan & Exchange Bank by handing to and leaving a true and correct copy thereof with C. W. Tune, Asst. Cashier, personally at Laurens, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(213)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Bank of Orangeburg, by handing to and leaving a true and correct copy thereof with R. F. Bryant, cashier of said bank, personally at Orangeburg, S. C., in said district, on the 7th day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By A. FISCHER, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(214)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named National Exchange Bank by handing to and leaving a true and correct copy thereof with J. L. Glenn, president, personally at Chester, S. C., in said district, on the 9 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
R. H. DOBSON, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(215)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Commercial Bank by handing to and leaving a true and correct copy thereof with C. J. Shannon, president, personally at Camden, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(216)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Peoples Savings Bank by handing to and leaving a true and correct copy thereof with S. G. Thompson, president of said bank, personally at Abbeville, S. C., in said district, on the 9 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. B. McADAMS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(217)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named City National Bank by handing to and leaving a true and correct copy thereof with J. Johnson, cashier, personally at Greenville, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(218)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named Greenville Savings Bank by handing to and leaving a true and correct copy thereof with F. F. Capers, Treas., personally at Greenville, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(219)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Savings Bank by handing to and leaving a true and correct copy thereof with W. P. Roof, president, personally at Lexington, S. C., in said district, on the 9 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By CHARLES T. SENN, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(220)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named Peoples National Bank of Charleston, S. C., by handing to and leaving a true and correct copy thereof with R. G. Rhett, president, personally at Charleston, S. C., in said district, on the 7th day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. L. ADAMS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(221)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Peoples Bank by handing to and leaving a true and correct copy thereof with W. C. Beacham, cashier, personally at Greenville, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(222)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Norwood Bank by handing to and leaving a true and correct copy thereof with A. L. Mills, cashier, personally at Greenville, S. C., in said district, on the 7 day of March, A. D., 1908. Bank of Charleston, by handing to and leaving a true and correct copy thereof with E. H. Pringle, president, personally at Charleston, S. C., in said district, on the 7th day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By REUBEN GOSNELL, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(223)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Merchants & Farmers Bank by handing to and leaving a true and correct copy thereof with A. L. White, president, personally at Spartanburg, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. H. McLANE, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(224)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The First National Bank by handing to and leaving a true and correct copy thereof with W. E. Burnett, president, personally at Spartanburg, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. H. McLANE, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(225)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named Central National Bank by handing to and leaving a true and correct copy thereof with John A. Land, president, personally at Spartanburg, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. H. McLANE, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(226)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Bank of Dillon by handing to and leaving a true and correct copy thereof with W. T. Bethea, cashier, & acting president, at 10:30 P. M., personally at Dillon, S. C., in said district, on the ninth day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By P. P. MEEKINS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(227)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named Enterprise Bank by handing to and leaving a true and correct copy thereof with Wilson G. Harvey, president, personally at Charleston, S. C., in said district, on the 7th day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. L. ADAMS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(228)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named Merchants & Planters Bank by handing to and leaving a true and correct copy thereof with C. M. Smith, president, personally at Gaffney, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. H. McLANE, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(229)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Farmers & Merchants Bank by handing to and leaving a true and correct copy thereof with J. R. Vandiver, president of said bank, personally at Anderson, S. C., in said district, on the 9 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. B. McADAMS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(230)

I hereby certify and return that I served the annexed amended bill sub. ad re. order on the therein-named The Farmers & Merchants Bank of Walterboro, S. C., by handing to and leaving a true and correct copy thereof with R. H. Wickman, president of said bank, personally at Walterboro, in said district, on the 9th day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By V. P. CLAYTON, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(231)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Commercial & Savings Bank of Florence, S. C., by handing to and leaving a true and correct copy thereof with A. M. Kittrell, cashier, personally at Florence, S. C., in said district, on the 6th day of March, A. D., 1908.
Greenville Savings Bank by handing to and leaving a true and correct copy thereof with F. F. Capers, Treas., personally at Greenville, S. C., in said district, on the 7 day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By J. L. ADAMS, Deputy.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of S. C. } *ss:*

(232)

I hereby certify and return that I served the annexed amended bill sub. ad re. & 1 order on the therein-named The Bank of Hartsville, by handing to and leaving a true and correct copy thereof with J. L. Coker, president, A. M. McNair, vice-president, & L. Vaughan, cashier, at 12:30 P. M., personally at Hartsville, S. C., in said district, on the ninth day of March, A. D., 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By P. P. MEEKINS, Deputy.

Petition of Intervention of Frank G. Tullidge Co. et al.

(233) Filed March 5, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Petitioners,
against
W. J. Murray et al., Respondents.

Petition of Intervention of the Frank G. Tullidge Company Et Al.

To the Judges of the Circuit Court of the United States for the District of South Carolina:

Your petitioners, The Frank G. Tullidge Company, The Live Oak Distilling Company, Joseph A. Magnus & Company, The Old 76 Distilling Company, J. F. Beckman & Company, Paul Jones & Company, The Anheuser-Busch Brewing Association, The Belroy Distilling Company, The Big Four Distilling Company, H. A. Thierman & Company, D. Sachs & Sons, The Maring-Hart Company, H. Rosenthal & Son, & Augusta Brewing Company, show to the court:

That there is justly due to them from the State Dispensary of South Carolina, the following sums for liquors sold and delivered to said Dispensary during the year 1906 and prior to February 16th, 1907, to-wit:

To the Frank G. Tullidge Company,	$ 1,049.69
To the Live Oak Distilling Company,	26,190.82
To Joseph A. Magnus & Company,	16,648.76
To The Old 76 Distilling Company,	3,208.33
To J. F. Beckman & Company,	2,561.22
To Paul Jones & Company,	14,927.88
To The Anheuser-Busch Brewing Asso'n,	9,504.09
To the Belroy Distilling Company,	38,004.17
To The Big Four Distilling Company,	4,238.94
To H. A. Thierman & Company,	8,674.60
To D. Sachs & Sons,	8,480.05
To The Maring-Hart Company,	15,506.34
To H. Rosenthal & Son,	3,619.29
To Augusta Brewing Company,	1,211.25

(234) That said indebtedness are just liabilities of said State Dispensary, payable out of the funds in the hands of the defendants, the State Dispensary Commission, under the provisions of the Act approved February 16th, 1907, entitled an Act to Provide for the Disposition of all property connected with the State Dispensary and to wind up its affairs, and that the said amounts have been settled and adjudicated by said State Dispensary Commission to be due to your petitioners, as appears by the decrees of said State Dispensary Commission, duplicate originals of which, duly certified, are hereto attached and made a part hereof, and the said Commission have decreed that warrants for said sums be issued to your petitioners for said several amounts.

That the funds in the hands of said State Dispensary Commission are more than sufficient to pay said sums found due to your petitioners and all of the other just liabilities of said State Dispensary.

Your petitioners therefore pray that this intervening petition may be received and filed and that an order may be entered authorizing the defendants, the State Dispensary Commission, to pay the said sums found to be due to your petitioners out of the funds in their hands, and that the order of injunction heretofore entered in this case and in the case of the Fleischman Company against W. J. Murray et al., be modified accordingly.

LAWRENCE MAXWELL, JR.,
Attorney for Petitioners.

Claim on Account of Sales to State Dispensary.

(235)

Duplicate Original.

Frank G. Tullidge Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharge against the State of South Carolina amounting to the sum of $86.25, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Frank G. Tullidge Co. against the State of South Carolina for the sum of

$1,049.69. The balance of account, which from the books of the Dispensary appears to stand open in favor of Frank G. Tullidge & Co. is for the sum $1,135.94; the amount of $86.25 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the sum of $1,049.69.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 3rd day of March, 1908.

W. J. MURRAY, Comr.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(236)

Live Oak Distilling Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharge against the State of South Carolina amounting to the sum of $1,781.40, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of the said Live Oak Distilling Company against The State of South Carolina for the sum of $26,190.82. The balance of account, which from the books of the Dispensary appears to stand open in favor of Live Oak Distilling Company is for the sum of $27,972.22; the amount of $1,781.40 being the aggregate amount of said overcharge is hereby deducted therefrom, which leave due the said claimant the said sum of $26,190.82.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 3rd day of March, 1908.

W. J. MURRAY, Comr.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(237)

Duplicate Original.

Jos. A. Magnus & Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharge against the State of South Carolina amounting to the sum of $1,555.48, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Jos. A. Magnus & Co. against the State of South Carolina for the sum of $16,648.76. The balance of account, which from the books of the Dispensary appears to stand open in favor of Jos. A. Magnus & Co. is for the sum of $18,204.24; the amount of $1,555.48 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said sum of $16,648.76.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 3rd day of March, 1908.

W. J. MURRAY, Comr.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(238)

Duplicate Original.

Old 76 Distilling Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharge against the State of South Carolina amounting to the sum of $454.50, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Old 76 Distilling Co. against the State of South Carolina for the sum of $3,208.33. The balance of account, which from the books of the Dispensary appears to stand open in favor of Old 76 Distilling Co. is for the sum of $3,662.83; the amount of $454.50 being the aggregate amount of said overcharge is hereby deducted therefrom, which leaves due the said claimant the sum of $3,208.33.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 3rd day of March, 1908.

W. J. MURRAY, Comr.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(239)

J. F. Beckman & Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharge against the State of South Carolina amounting to the sum of $163.48, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said J. F. Beckman & Co. against the State of South Carolina for the sum of $2,561.22. The balance of account, which from the books of the Dispensary appears to stand open in favor of J. F. Beckman & Co. is for the sum of $2,724.70; the amount of $168.48 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the said sum of $2,561.22.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Comr.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(240)

Duplicate Original.

Paul Jones & Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina amounting to the sum of $6,248.75, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of the said Paul Jones & Co. against the State of South Carolina for the sum of $14,927.88. The balance of account, which from the books of the Dispensary appears to stand open in favor of Paul Jones & Co., is for the sum of $21,176.63; the amount of $6,248.75 being the aggregate amount of said overcharge is hereby deducted therefrom, which leaves due the said claimant the said sum of $14,927.88.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 18th day of February, 1908.

W. J. MURRAY, Comr.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

I hereby certify that the above and foregoing is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This March 3d, 1908.

JOHN McSWEEN,
Secretary of Commission.

Claim on Account of Sales to State Dispensary.

(241)

Duplicate Original.

Anheuser-Busch Brewing Association
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina, amounted to the sum of $10,047.00, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Anheuser-Busch Brewing Association against the State of South Carolina for the sum of $9,504.09. The balance of account which from the books of the Dispensary appears to stand open in favor of Anheuser-Busch Brewing Association is for the sum of $19,551.09, the amount of $10,047.00 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the said sum of $9,504.09.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 25th day February, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

I hereby certify that the above and foregoing is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This March 3d, 1908.

JOHN McSWEEN,
Secretary of Commission.

Claim on Account of Sales to State Dispensary.

(242)

Duplicate Original.

Belroy Distilling Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly consituted Commission created to investigate and make disposition of all matters and things concernings the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina amounting to the sum of $2,004.16, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Belroy Distilling Co. against the State of South Carolina for the sum of $38,004.17. The balance of account, which from the books of the Dispensary appears to stand open in favor of Belroy Distilling Co. is for the sum of $40,008.33; the amount of $2,004.16 being the aggregate amount of said overcharges is hereby de-

ducted therefrom, which leaves due the said claimant the sum of $38,004.17.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN,
Secretary Disp. Commission.

Claim on Account of Sales to State Dispensary.

(243)

Duplicate Original.

Big Four Distilling Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina, amounting to the sum of $270.57 and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Big Four Distilling Co. against the State of South Carolina for the sum of $4,238.94. The balance of account, which from the books of the Dispensary appears to stand open in favor of the Big Four Distilling Co. is for the sum of $4,509.51; the amount of $270.57 being the aggregate amount of said overcharge is here-

by deducted therefrom, which leaves due the said claimant the sum of $4,238.94.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(244) Duplicate Original.

H. A. Thierman & Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make deposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina amounting to the sum of $553.70, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said H. A. Thierman & Co. against the State of South Carolina for the sum of $8,674.60. The balance of account, which from the books of the Dispensary appears to stand open in favor of H. A. Thierman & Co. is for the sum of $9,228.30; the amount of $553.70 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the said sum of $8,674.60.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(245) Duplicate Original.

D. Sachs & Sons
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina amounting to the sum of $541.28, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said D. Sachs & Sons against the State of South Carolina, for the sum of $8,480.05. The balance of account, which from the books of the Dispensary appears to stand open in favor of D. Sachs & Sons is for the sum of $9,021.33; the amount of $541.28 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the sum of $8,480.05.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA.
County of Richland.

This is to certify that the above is a true and correct duplicate original of the decree of the Commission therein mentioned in the above stated case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(246) Duplicate Original.

Maring-Hart Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina amounting to the sum of $341.10, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Maring-Hart Co. against the State of South Carolina, for the sum of $15,506.84. The balance of amount, which from the books of the Dispensary appears to stand open in favor of Maring-Hart Co. is for the sum of $15,847.44; the amount of $341.10 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the said sum of $15,506.34.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Com'r.
C. K. HENDERSON, Com'r.
JOHN McSWEEN, Com'r.

State Dispensary Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

(247) I hereby certify that the decree hereto attached is a full, complete and correct duplicate original of the decree rendered in the case of Maring-Hart Co. *v.* The State of South Carolina, which was this day tried before the State Dispensary Commission and that the decree rendered therein was consented to by counsel for claimant.

This March 4th, 1908.

JOHN McSWEEN,
Secretary of Commission.

Claim on Account of Sales to State Dispensary.

(248)

H. Rosenthal & Son.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in the above entitled cause having submitted an itemized statement of account of said claimant which shows overcharges against the State of South Carolina amounting to the sum of $904.82, and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of the said H. Rosenthal & Son against the State of South Carolina for the sum of $3,619.29. The balance of account, which from the books of the Dispensary appears to stand open in favor of H. Rosenthal & Son is for the sum of $4,524.11; the amount of $904.82 being the aggregate amount of said overcharges is hereby deducted therefrom, which leaves due the said claimant the said sum of $3,619.29.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 4th day of March, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

THE STATE OF SOUTH CAROLINA,
County of Richland.

This is to certify that the above is a true and correct copy of the decree and order of the Commission in the foregoing case.

This 4th day of March, 1908.

JOHN McSWEEN, Secretary.

Claim on Account of Sales to State Dispensary.

(249)

Augusta Brewing Co.
vs.
The State of South Carolina.

The foregoing matter coming on for trial before the duly constituted Commission created to investigate and make disposition of all matters and things concerning the South Carolina Dispensary, and counsel for the claimant in above entitled cause having submitted an itemized statement of account of said claimant, and overcharges against the State of South Carolina amounting to the sum of $403.75, being shown and counsel representing said claimant consenting thereto;

Decree is hereby entered in favor of said Augusta Brewing Co. against the State of South Carolina for the sum of $1,211.25. The balance of account, which from the books of the Dispensary appears to stand open in favor of said Augusta Brewing Co. is for the sum of $1,615.00; the amount of $403.75 being the aggregate amount of said overcharges is hereby deducted therefrom which leaves due the said claimant the said sum of $1,211.25.

It is further decreed that warrant issue in behalf of said claimant for said sum hereby decreed to be due.

This 31st day of January, 1908.

W. J. MURRAY, Com'r.
JOHN McSWEEN, Com'r.
C. K. HENDERSON, Com'r.

State Dispensary
Commission.

STATE OF SOUTH CAROLINA,
County of Richland.

I hereby certify that the above and foregoing is a true and correct duplicate original of the decree of the Commission therein named, in the case therein stated.

This March 4th, 1908.

JOHN McSWEEN,
Secretary of Commission.

Prayer of Dispensary Commission Joining in Petition of Frank G. Tullidge Company et al.

(250) Filed March 5th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Petitioners,
against
W. J. Murray et al., Defendants.

The defendants, the State Dispensary Commission, join in the prayer of the intervening petition of The Frank G. Tullidge Company et al., herein, without waiving their right to object to the jurisdiction of the court.

W. J. MURRAY, Commissioner.
C. K. HENDERSON, Commissioner.
JOHN McSWEEN, Commissioner.

State Dispensary
Commission.

Filed March 5th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Order Authorizing Dispensary Commission to Pay Out Certain Funds.

(251) Filed 5th day March, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Petitioners,
against
W. J. Murray et al., Defendants.

This case came on for a hearing upon the verified intervening petition of the Frank G. Tullidge Company et al., and the duly certified copies of the decrees of the State Dispensary Commission, thereto attached, and the application of the State Dispensary Commission, on consideration whereof the court finds that said petitioners are entitled to the relief prayed by them, and it is accordingly ordered that the State Dispensary Commission of South Carolina be, and they are hereby authorized to pay out of the funds in their hands the amounts so found by them to be due, and to issue warrants or checks in proper form therefor upon the depositions, to-wit:

To The Frank G. Tullidge Company,	$ 1,049.69
To The Live Oak Distilling Company,	26,190.82
To Joseph A. Magnus & Company,	16,648.76
To The Old 76 Distilling Company,	3,208.33
To J. F. Beekman & Company,	2,561.22
To Paul Jones & Company,	14,927.88
To The Anheuser-Busch Brewing Association,	9,504.09
To The Belroy Distilling Company,	38,004.17
To The Big Four Distilling Company,	4,238.94
To H. A. Thierman & Company,	8,674.60
To D. Sachs & Sons,	8,480.05
To The Maring-Hart Company,	15,506.34
To H. Rosenthal & Son,	3,619.29
To Augusta Brewing Company,	1,211.25

(252) Said Dispensary Commission are authorized to issue their warrants or checks for said sums in favor of said parties or their attorneys, and the depositories in which the funds of said Commission are deposited are authorized to pay the same, and the injunctions heretofore issued in this case and in the case of the Fleischmann Company against W. J. Murray et al.,

are hereby modified accordingly and the funds necessary to pay said checks or warrants are hereby released from the operation of said injunctions.

J. C. PRITCHARD,
U. S. Circuit Judge.

March 5th, 1908.

Petition of Messrs. Merrick & Barnard.

(253) Filed March 5th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

The Wilson Distilling Company et al.,
vs.
W. J. Murray and others.

Petition of Merrick & Barnard.

Duff Merrick and Alf. S. Barnard, partners, under the firm name of Merrick & Barnard, hereby petition the court for leave to personally intervene in this suit and represent and show unto the court as follows:

That they are practicing attorneys at law, residing at Asheville, North Carolina, and have heretofore been duly admitted to practice in this court.

That they have heretofore been regularly employed by the Belroy Distilling Company and The H. A. Thierman Company, to represent them in the collection of their several claims against the defendants in this suit, and have performed many legal services in connection with the prosecution of said claims, for which they have been paid nothing by the said claimants.

That, without consulting your petitioners and without their knowledge, said Belroy Distilling Company and said The H. A. Thierman Company, have compromised and settled their said claims against said defendants, and have petitioned this court for an order permitting same to be paid out of the funds in said defendants' hands, the disposition of which has heretofore been enjoined by this court which order, as your petitioners are informed and believe, the court will grant, or has granted.

That if the amounts so due said claimants so represented by your petitioners shall be paid, your petitioners fear that they will have difficulty in securing prompt payment for their pro-

per charges for services, unless the control of the amounts sever-
(254) ally due them shall be retained by this court until your petitioners' claims for services have been adjusted.

Wherefore, your petitioners pray for the court for an order directing that the amounts severally due to the said Belroy Distilling Company and said the H. A. Thierman Company, be held by some proper person pending the adjustment and settlement of the fees due your petitioners as aforesaid.

This March 5th, 1908.

MERRICK & BARNARD.

Order to Pay Lawrence Maxwell, Jr., Amounts Due Belroy Distilling Co. and H. A. Theirman & Co.

(255) Filed March 5, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

Wilson Distilling Company et al.
vs.
W. J. Murray et al.

It is ordered by the court that the amounts severally due *in* the Belroy Distilling Company and H. A. Theirman & Company by the State Dispensary Board of South Carolina, this day directed to be paid by the court upon the petition of said Belroy Distilling Company and said Theirman & Company, and others, shall be paid to Lawrence Maxwell, Jr., Esq., attorney filing said petition and held by him until said Belroy Distilling Company and said H. A. Theirman & Company have made satisfactory settlement for fees due to Merrick & Barnard, Attys., in connection with their said claims against said Dispensary Board, on the further order of the court it having been made to appear satisfactorily to the court that said Belroy Distilling Co. and said H. A. Theirman & Company have heretofore employed said Merrick and Barnard as attorneys at law to represent them in collecting said claims.

March 5th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Petition of New York and Kentucky Company and Order Thereon.

(256) Filed March 9th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al., Complainants, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

The petition of the New York and Kentucky Company respectfully shows:

1. That the plaintiff, New York and Kentucky Company, was at the times hereinafter mentioned and now is a corporation duly chartered and organized under the laws of the State of New York and having its place of business in the City of Rochester in said State.

2. That heretofore during the years 1905 and 1906, viz.: from the 6th day of November, 1905, to the 25th day of January, 1906, both inclusive, your petitioner sold to the State Dispensary of South Carolina, through its directors who were the proper officers authorized by law to purchase wines and liquors, for the said Dispensary whiskies and other liquors to the amount and value of $61,995.64 and your petitioner shipped said goods to the State Dispensary, and the same were accepted by it through its duly authorized officers, and as your petitioner is informed and believes a large portion thereof were sold by said Dispensary at a large profit, the portion not so sold being hereinafter referred to as returned; that an invoice and account of the goods so sold and delivered, was duly rendered by your (257) petitioner to said Dispensary through its proper officers and agents; and that the price of said goods was agreed upon between the officers of said Dispensary and your petitioner; that there has been paid on the said goods the sum of $18,062.63 and that certain liquors to the value of $17,276.19 have been

returned by the said Dispensary Commission and accepted by your petitioner; that the balance is justly due your petitioner and that the price at which said liquors were sold to the Dispensary as above stated were fair and reasonable.

3. That your petitioner is entitled to be paid the sum due as alleged out of the funds described in the original and amended petitions filed in the above entitled cause; that it has an interest in the subject matter of said cause, and it is necessary for it to intervene in said cause to protect its right and interest in the said subject matter; that payment has been and still is refused.

4. That your petitioner is desirous of intervening in the above stated cause in order to protect its respective interests and to be made a party complainant therein; it adopts the several allegations and prayers of the petition filed therein and desires leave to file such further pleadings as may be meet and proper in the premises.

Wherefore petitioner prays that this intervention be allowed, that it be made a party complainant in said cause, and that this intervention be filed as a part of the record in said cause, and that it be granted all the relief prayed for by the complainant in the original and amended bills.

NEW YORK AND KENTUCKY COMPANY,
By WESTON & AYCOCK, Attorneys.

STATE OF SOUTH CAROLINA,
County of Richland.

Before me personally appeared W. T. Aycock, who, being duly sworn, says that he is one of the attorneys for the intervening party here in New York and Kentucky Co., a corporation, and that he makes said verification of this bill on behalf of the same; that no officer or agent of said corporation is within the District of South Carolina to the knowledge of the deponent at the time of preparing the foregoing petition; that the said foregoing petition is made upon information and belief conveyed to deponent by officers and agents of said intervening creditor, and that he believes the allegations thereof to be true.

W. T. AYCOCK.

Sworn to and subscribed before me this 5th day of March, 1908.

J. TEAM GETTYS,
[Seal] Notary Public for South Carolina.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

(258)

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., constituting the State Dispensary Commission of South Carolina, and W. J. Murray et al., individually, Defendants.
} In Equity.

Order.

Upon reading and considering the petition of New York and Kentucky Company, of Rochester, New York, which appears through counsel and asks and seeks to be made a party complainant herein, intervening for that purpose.

It is Ordered

That it be and it hereby permitted to intervene and it is hereby made a party complainant herein and granted leave to file the foregoing petition as a part of the record in the above named cause with leave to file such other and further pleadings as may be necessary and proper in the premises.

This 7th day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Return of W. J. Murray et al.

(259) Filed 9th day March, 1908.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT, FOURTH CIRCUIT.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.
} In Equity.

And now come the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, upon whom have been served the Amended and Supplemental Complaint herein and the Order to Show Cause herein of February 19th, 1908, requiring them to show cause why the relief praved for in said bill should not be granted and why a Receiver should not be appointed and injunction issued as therein praved, and

without submitting themselves to the jurisdiction of this Honorable Court but on the contrary, insisting that it is without jurisdiction in the premises, and reserving the right to demur, plead or answer in accordance with the rules of practice and procedure which obtain in this court and solely in response to the said Order to Show Cause, respectfully show:

1.

That the said complainants by and in said bill have not stated such a cause as doth or ought to entitle them to any such relief as is thereby sought or prayed for from or against the defendants herein or any of them.

2.

That this suit is and on the face of complainants' bill and from the allegations therein contained appears to be in effect a suit against the State of South Carolina, seeking as it does, to coerce the said State through it officers into the payment of al- (260) leged claims against it, to substitute this court in the place of its officers in the exercise of the authority, discretion and jurisdiction conferred upon them by Statute and to usurp their functions to take the funds of the said State out of the hands of its officers, and place them in the hands of a receiver or receivers of this court. And to enjoin and restrain these defendants as the officers of the said State from paying over or disposing of said funds as the said State has directed or may hereafter direct; and that this suit is therefore without the jurisdiction of this court under the provisions of the Eleventh Amendment to the Constitution of the United States of America.

3.

That the State of South Carolina is, and on the face of complainants bill and from the allegations therein contained, appears to be an indespensable party to this suit, but that said State has not been made a party on the record and under the provisions of the said Eleventh Amendment to the X Constitution of the United States of America, cannot be made a party to the record without its consent, which consent has never been given.

4.

That the defendants as the State Dispensary Commission under the Act of the General Assembly of the State of South Carolina creating the same entitled "An act to provide for the

disposition of all property connected with the State Dispensary and to wind up its affairs," approved February 16th, 1907, and the Acts amendatory thereto constitute a court of the State of South Carolina within the meaning of Section 720 of the Revised Statutes of the United States which declares that, "The Writ of Injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

5.

That said bill of multifarious as to the parties complainant in that said parties complainant are without a common interest in the subject of litigation, have no connection with each other, (261) and are seeking thereby each for itself the collection of its own alleged separate and distinct claim and the protection of its own alleged separate and distinct interest.

6.

That it appears upon the face of the complainant's bill that it sets forth no ground of equitable jurisdiction such as insolvency or otherwise upon which the jurisdiction in equity of this Honorable Court can attach, it appearing from the allegations of paragraph 12 of the said bill that the funds in the hands of the defendants as constituting the said State Dispensary Commission are about two hundred thousand dollars ($200,000) in excess of the aggregate of all the claims against the State in connection with the business of its said Dispensary.

7.

And further showing cause herein, these defendants, in regard to paragraphs 1, 2 and 3 of the said bill, admit the allegations therein contained.

8.

That in regard to paragraph 4 of said bill these defendants deny the allegations thereof so far as the same may be inconsistant with the Acts of the Legislature of the State of South Carolina, therein referred to, under a proper construction thereof, and further they aver as follows, that "The manufacture, sale, barter, and exchange of intoxicating liquors" was prohibited, and the State of South Carolina, in the exercise of her police powers engaged in and monopolized the liquor traffic, and to

that end appointed and established the State Dispensary and appropriated fifty thousand dollars ($50,000) for commencing the said business. Said Dispensary however, had no existence or entity or credit separate and apart from the said State, it was a mere agency of the State for the conduct and operation of her business. The business belonging to the State. All purchases, therefore, were made by the State and upon her credit. All profits of the business and the stock on hand at the time the State Dispensary was abolished belong to the State.

9.

(262) That, in regard to paragraph 5 of said bill, these defendants admit that some time during the year of 1906, or the early part of 1907, the complainants did undertake to sell to the State of South Carolina through its agents, the said Board of Directors of the State Dispensary, certain *alcholic* liquors and under and in pursuance of said attempted sale did deliver the same to the Board of Directors of the State Dispensary for said State, but they allege that the said attempted sales were not made in accordance with law and were in violation of the Statutes of the State of South Carolina relating to the said State Dispensary and were and are illegal and void and upon information and belief the defendants allege that the said pretended sales were attempted to be made in pursuance of a conspiracy between the complainants and officers of the State to cheat and defraud the State by charging and collecting from the State prices for said alcoholic liquors largely in excess of the fair and market value thereof and that in attempting to make such sales the complainants did not comply with and violate the law of the State of South Carolina relative to the sale and purchase of alcoholic liquors in connection with the said State Dispensary in the following particulars, among others, to-wit:

(a) They failed to accompany their bids, or all of them, with the chemical analysis of the liquor offered for same.

(b) They failed to furnish the bonds required by law to insure the compliance by them with the terms of the contract of purchase and sale between them and the State Dispensary.

(c) They violated said law in that they constantly had agents, representatives and solicitors in the State for the purpose of soliciting the purchase of their goods by said State, and that through its said agents and representatives they solicited business from said board of directors and co-operated with the board in disregarding the law in other particulars.

And these defendants further allege that even if said sales were not illegal and void yet upon a proper accounting between complainants and the State there would be left no balance whatever owing on their said claims or any of them.

And except as hereinbefore admitted these defendants deny each and every allegation in said paragraph 5 of said bill of complaint continued.

(263)

10.

That, in regard to paragraph 6 of the said bill, these defendants admit the allegations thereof, but they allege that since the passage of said Act and at its regular session in the year 1908, the General Assembly of the State of South Carolina passed an Act amending the Acts set out in said paragraph 6, which said amendatory Act was duly approved on the 24th day of February, 1908, and which, among other things, provides as follows:

"Section 9. That the Commissioners of the Sinking Fund be and they are hereby authorized and required, upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and warerooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell the same under and pursuant to the terms of section 91, Code of Laws, South Carolina, Vol. 1, 1902, provided that the said property shall not be sold for less than seventy-five thousand dollars ($75,000) and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same.

Section 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending in the said suit, be paid by the Dispensary Commission out of the assets now in their hands, belonging to the State and arising from the assets of the Dispensary.

Section 11. That the said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary. And to pay for the State any and all just claims, which have been submitted to and determined by it and no other, out of the

assets of the Dispensary which have been or may hereafter be collected by the said State Dispensary Commission; Provided, that each and every person, firm or corporation, presenting a claim or claims to said Commission, shall have the right to appeal to the Supreme Court, as in cases at law; Provided further, That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court.

Section 12. That no funds arising from the sale of the assets of the former State Dispensary, or from the Collection of debts due the said Dispensary, or moneys delivered by the State Treasury to said Commission, shall be paid out for any purpose, or to any person whatsoever, except upon the check of (264) of the Chairman of said Commission, countersigned by the Treasurer of the State of South Carolina. And the Treasurer of the State of South Carolina shall countersign such checks as may be presented by the Chairman of said Commission only upon presentation of the same together with a certificate of said Commission, or a majority thereof which certificate shall show; that the said check is issued in payment of some expense provided for the Statute; or necessarily incident to closing up the affairs of the Dispensary or for services rendered said Commission in closing up the affairs of said Dispensary; or contracted for in accordance with law by said State Dispensary Commission; or that it is in payment of a claim of a creditor which has been adjudged by said Commission to be due and upon such adjudication ordered paid."

11.

That in regard to paragraph 7 of the said bill these defendants admit their qualification and organization as the State Dispensary Commission, their entry upon the discharge of their duties and that they took possession as such Commission and for the State of the liquors and supplies on hand connected with the State Dispensary and also admit that the State Treasurer turned over to them as such Commission a certain fund then in his hands but whether his action in this regard was or was not authorized and legal is entirely a question of the proper construction of the said Act of February 16, 1907, creating said Commission. And these defendants further admit that they have collected many of the debts due the State in connection with the said State Dispensary and that they now have on hand and on deposit in a number of banks about eight hundred thou-

sand dollars ($800,000), and that the same is applicable as directed by the said Act and Acts amendatory thereto and as otherwise directed by other Acts of the General Assembly of the State of South Carolina.

And except as herein admitted these defendants deny such and every allegation in said paragraph 7 contained.

12.

That, in regard to paragrphs 8, 9, 10 and 11 of the said bill, these defendants admit that the said complainants therein mentioned at some time during the year 1906, or the year 1907 did undertake to sell to the State of South Carolina, through its (265) agents the said Board of Directors of the State Dispensary, certain alcoholic liquors and under and in pursuance of such attempted sales did deliver the same to the said Board of Directors of the State Dispensary for the said State, but they allege the same said attempted sales were not made in accordance with law and were in violation of the Statutes of the State of South Carolina relating to the said State Dispensary and were and are illegal and void; and upon information and belief the defendants allege that the said pretended sales were attempted to be made in pursuance of a conspiracy between the complainants and officers of the State to cheat and defraud the State by charging and collecting from the State prices for said alcoholic liquors largely in excess of the fair and market value thereof and that in attempting to make such sales the complainants did not comply with and violated the law of the State of South Carolina relative to the sale and purchase of alcoholic liquors in connection with the said Dispensary in the following particulars, among others, to wit:

(a) They failed to accompany their bids, or all of them, with the chemical analysis of the liquor offered for same.

(b) They failed to furnish the bonds required by law to insure the compliance by them with the terms of the contract of purchase and sale between them and the State Dispensary.

(c) They violated said law in that they constantly had agents, representatives and solicitors in the State for the purpose of soliciting the purchase of their goods by said State, and that through its said agents and representatives they solicited business from said board of directors, and co-operated with the board in disregarding in other particulars.

And these defendants further allege that even if said sales were not illegal and void yet upon a proper accounting between complainants and the State there would be left no balance whatever owing on their said claims or any of them.

And except as hereinbefore admitted these defendants deny each and every allegation in said paragraph 5 of said bill of complaint contained.

13.

(266) That as regards paragraph 12 of the said bill they admit the allegations thereof except that the property and debts therein referred to as sold and collected were not the property of and debts due to the said Dispensary as therein alleged, but the property of and debts due to the State of South Carolina in connection with the said Dispensary; but these defendants deny that said funds are applicable to the payment of the alleged claims of the complainants except so far as said claims upon investigation by said Commission may be adjudged by said Commission to be just and valid claims against the State in whole or in part.

14.

That as regards paragraph 13 of said bill these defendants deny each and every allegation thereof.

15.

That, as regards paragraph 14 of said bill, these defendants admit the allegations thereof, except that they deny that said money is subject to withdrawal by said Commission, and allege that under the amendatory Act hereinbefore referred to, said funds can only be paid out upon the check of the Chairman of said Commission, countersigned by the Treasurer of the State of South Carolina under the circumstances and for the specific purposes in said amendatory Act; and except that these defendants allege that the said money is deposited to the credit of said Commission as the agents of the State of South Carolina and is legally and substantially in the possession of the said State, and subject to be checked out of said banks only as hereinbefore stated, and except that they deny that the said funds have not been mingled with other funds of the State.

16.

That, in regard to paragraph 15 of the said bill, these defendants deny each and every allegation therein contained, ex-

cept as the same may be hereinafter admitted. They have denied and do deny that the said funds in their hands are impressed with any trust in favor of complainants and that they owe any duty to the creditors of the State of South Carolina ((267) in connection with the business of the State Dispensary except as may be provided in the said Act of February 16, 1907, and said amendatory Act of February 24th, 1908, and they admit that under said legislation they do claim exclusive jurisdiction to investigate and pass upon the validity or invalidity of all claims against the State of South Carolina in connection with the said State Dispensary, subject only under said amendatory Act to appeal to the Supreme Court of the State, as therein provided for. And specially as regards subdivision "D" of said paragraph 15 these defendants refer to paragraph 21 of their return to the rule to show cause in the case of Fleischmann Company against these defendants now pending in this court and pray that same may be read herewith as a part of this return.

17.

That as regards paragraph 16 of said bill, these defendants deny each and every allegation therein contained.

18.

That in regard to paragraph 17 of the said bill these defendants admit that there are a large number of persons claiming to be creditors of the State in connection with the said State Dispensary, but they allege that all of these persons, including the complainants, have filed their said claims with the said commission for investigation and adjudication, which claims so filed are in number and amount in the aggregate to ———

And these defendants allege that none of these claimants have brought suit against the Commission in the State or Federal courts or otherwise than by filing same with the said Commission for investigation and adjudication as aforesaid except The Garrett Co., The Fleischmann Co., and the complainants herein who have brought suit in this Honorable Court and except such other persons as may have intervened in the said suits brought by these parties.

And these defendants further allege that after such delay as was necessarily involved in having the said claims properly audited by an Audit Company employed for that purpose and in the discharge of the duty imposed upon them by the said

Act creating the said Commission, they commenced on the day of 190 the work of investigating the said claims in order to ascertain and adjudicate their validity or invalidity (268) as required by said Act. But these defendants have been greatly harrassed and impeded in the prosecution of the said work and the discharge of the duties devolved upon them by the said Act by the said suits brought against them by the said parties in this court.

But notwithstanding such interruptions the defendants have proceeded with their said work down to the present time and are still proceeding with it.

Of the whole number of claims filed as aforesaid these defendant have investigated and adjudicated and ordered for payment as follows claims aggregating $ and these claims have not been paid before this only because of the injunctions issued by this court in the said suits brought in this court as aforesaid.

These defendants now have under investigation and in course of adjudication claims including the claims of the complainants herein, Anheuser Busch Brewing Association.

And these defendants say that so far all their adjudications of said claims have been accepted by the parties concerned as satisfactory although in all or nearly all of them it has been found that on account of overcharges against the State deductions have had to be made by the Commission from the amounts claimed and the defendants further say that they have given fair notice to all claimants whose claims are still unadjudicated to come in and prove their said claims and that they are ready to proceed with the investigation and adjudication of such claims as soon as such parties shall come in and present their proofs thereof.

And except as herein admitted these defendants deny each and every allegation in said paragraph 17 contained.

18.

And further showing cause, as required by said order, these defendants pray that reference may be had, as far as the same may be applicable to their return and the affidavits and other papers connected therewith, to a similar order to show cause issued in the case of The Fleischmann Company against these defendants now pending in this court, and that same so (269) so far as applicable may be treated as of this return and read herewith.

And having made return to said order to show cause, as required thereby, these defendants pray that their said return

be adjudged sufficient and the said order to show cause be vacated and discharged.

STEVENSON & MATHESON,
ABNEY & MULLER,
ANDERSON, FELDER, ROUNDTREE & WILSON,
J. FRASER LYON,
Solicitors for defendants.

STATE OF SOUTH CAROLINA,
County of Richland.

(270) W. J. Murray, being duly sworn, says that the foregoing return is true to their own knowledge, except as to those matters therein stated upon information and belief, and as to these matters, he believes it to be true.

W. J. MURRAY.

Sworn to before me this 6th day of March, 1908.

W. F. STEVENSON, [L. S.]
Notary Public for South Carolina.

Affidavit of T. M. Mordecai.

(271) Filed March 9th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

Wilson Distilling Co. et al.
vs.
W. J. Murray et al.
Affidavit of T. M. Mordecai.

T. M. Mordecai, being first duly sworn, deposes and says, that he is one of the counsel for the above named plaintiff, and in the absence of time to have this affidavit made by one of its officers, makes the same in its behalf.

That, as affiant is informed and believes, on Thursday, the 5th day of March, 1908, this Governor of the State of South Carolina, sent a message to the Legislature, of said State, which is now in session, copy of which message taken from "The State," a newspaper published at Columbia, in said State, and

which affiant is informed and believes is a true copy of said message; that affiant is further informed and believes that acting upon such message, there has been introduced in the General Assembly of said State, a bill directing the State Dispensary Board to turn the funds in their hands into the State Treasury of said State, said funds being the same enjoined by this court from being in any way paid out or changed until its further order.

That as affiant is advised and believes, there is danger thus arising of said funds being placed beyond the jurisdiction of this court, and plaintiffs prevented from recovering the amounts justly due them from the defendants, and otherwise irreparably damaged, unless this court take said fund immediately into its actual possession by the appointment of a receiver or receivers therefor.

T. M. MORDECAI,

Sworn to and subscribed before me this March 6th, 1908.

[Seal] EUGENE WAY,
Notary Public.

To the Honorable the Senate and House of Representatives of South Carolina.

(272) Owing to the fact that the funds of the State of South Carolina which are now in the hands of the commission to wind up the State Dispensary, are sought to be taken from their hands, and to be administered by the United States Court without the consent of your honorable bodies, the only department of the State Government which has the right to give consent that the State be sued;

And as the autonomy of the State must be maintained, and the rights to administer her funds by her own agents preserved, and feeling that you realize the great principle of State Sovereignty and the rights of a State under a Constitution of the United States.

I respectfully recommend such legislation, at this session of the legislature, as will protect the interests of the State and obviate the necessity for further action on your part.

Respectfully,

M. F. AXSEL, Governor.

Executive Chamber, Columbia, S. C., March 5th, 1908.

Order Appointing Temporary Receivers.

(273) Filed March 9th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

Wilson Distilling Co. et al., Complainants,
vs.
W. J. Murray et al., Defendants. } Order.

It appearing to the satisfaction of the court that pending the hearing and determination of the motion for the appointment of receivers in this cause, the funds heretofore enjoined in the hands of the defendants may be jeopardized and further delay being deemed inexpedient; upon due consideration it is ordered, adjudged and decreed that W. J. Murray, John McSween, C. K. Henderson, B. F. Arthur & Avery Patton, be, and they hereby are appointed temporary receivers of all and singular the moneys, funds, property, rights, credits and assets involved in this cause, and heretofore enjoined from being disposed of, especially all the money now in the hands of the defendants arising out of the sale of property belonging to the State Dispensary of South Carolina, or from the collection of debts due it, and all other moneys deposited to the credit of the defendants composing the State Dispensary Commission, and deposited to their credit with the various banks and depositories made parties hereto;

It is further ordered that the said W. J. Murray, John McSween, C. K. Henderson, B. F. Arthur and Avery Patton, temporary receivers as aforesaid, do forthwith take possession of all and singular the said property and assets, and deposit the same to their credit as temporary receivers in the several depositories in which the same are now deposited;

It is further ordered that the defendants W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission, do forth-
(274) with pay over and deliver all such funds and property to said receivers, W. J. Murray, John McSween, C. K. Henderson, B. F. Arthur & Avery Patton by drawing their checks on the said several depositories in favor of the said temporary receivers, for the full amount of said respective deposits not heretofore drawn under the order and direction of this court, and each and every of the defendant banks and depositories are hereby ordered and directed to forthwith pay over and

transfer from the credit of said State Dispensary Commission to the credit of the said temporary receivers, the said respective sum or sums of money so deposited with them by said State Dispensary Commission;

It is further ordered that each of said temporary receivers do, within five days from the date of this order, give the usual bond as such receiver, each in the sum of fifty thousand dollars ($50,000) with surety or sureties to be approved by the United States Circuit Judge or the United States District Judge for the District of South Carolina, or the Clerk of this Court;

It is further ordered that the said receivers be and they hereby are invested and charged with the usual powers and duties of temporary receivers;

It is further ordered, adjudged and decreed that all of the parties to this cause, and all other persons whomsoever, their agents, servants and attorneys, be, and they hereby are restrained and enjoined from interfering in any way, directly or indirectly, with the receivers hereby appointed, or with their possession or control of the money, property and assets hereby ordered to be transferred to them.

This the 6th day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Order Consolidating Causes and Appointing Receivers.

(275) Filed March 9th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

Wilson Distilling Company et al.
vs.
W. J. Murray and others,
and
The Fleischmann Company,
vs.
W. J. Murray and others.
} In Equity.

The above entitled cause came on to be heard this day before the undersigned Judge at Chambers, in Asheville, North Carolina, the first, to-wit: The Wilson Distilling Company et al. *vs.* W. J. Murray et al. upon a rule to show cause why the relief prayed for in the bill filed in said cause should not be granted, and why a receiver should not be appointed to take

charge of and administer all the funds in the hands of the defendants, constituting the State Dispensary Commission of South Carolina, and upon the defendants' return to said notice, and the traverse thereto, together with the affidavits, records, and other evidence submitted in connection therewith, and the second, to-wit, The Fleischman Company *vs.* W. J. Murray, and others, upon a motion by complainant for the appointment of a receiver, notice of said motion having been waived by the defendant in open court and in writing, for the purpose of the hearing of said motion, and both causes having been heard and the court being of the opinion that the temporary restraining order heretofore granted in the first cause should be continued in force until the final determination of said cause, and that the complainants therein are entitled to the injunction prayed for in their said bills, and, upon consideration of the records in said causes and the evidence now before the court, the court being of the opinion that the motions for a receiver ought to be granted:

It is now, on motion of the solicitors for all of the complainants, ordered, adjudged and decreed by the court that these causes be and they are hereby consolidated; that the temporary restraining order heretofore issued in the first entitled cause, be and the same is hereby continued in full force and effect, until the final determination of said suit, or until the further order of this court, and that the defendants and each of them, their agents, attorneys and employes, be, and they are, hereby, restrained and enjoined from interfering with, paying out or transfering to any person or persons whomsoever, or in any way disturbing or changing the present status of the fund now in their possession and control, except to transfer, pay over and deliver the same to the receivers named in this order;

And it is further ordered that an injunction *pendente lite* issue in accordance with this order;

And the court being of the opinion that it is necessary for the preservation of the said fund and the proper administration of the same, and for securing to the complainants the relief prayed for in their bills, that receivers should be appointed to take charge of and administer, all and singular, the moneys, funds, property, rights, credits and assets involved in these cases, and heretofore enjoined from being disposed of, especially all the money now in the hands of the defendants, arising out of the sale of property belonging to or connected with the State Dispensary of South Carolina, or from the collection of debts due to it, and also all moneys deposited to the credit of the defendants composing the State Dispensary Commission in the various banks and depositories which have been heretofore made parties to these causes,

It is, therefore, ordered, adjudged and decreed that Joseph A. McCullough, C. K. Henderson, and B. F. Arthur, be, and they are, hereby appointed receivers of this court for the purpose of holding and administering the trust fund now in the hands of the defendants, and that said receivers be, and they are, hereby, authorized, empowered and directed to take imme-
(277) diate possession of all and singular, the moneys, funds, property, rights, credits and assets heretofore mentioned;

And it is further ordered, adjudged and decreed that the defendants and each of them, be and they are, hereby, required and commanded to pay over and deliver to said receivers, upon demand made of them, all of said moneys, funds, property, rights, credits or assets, or any part of the same which either of said defendants may have in his or its possession and control, including all securities which the defendants constituting the State Dispensary Commission, hold to secure the re-payment of any money deposited by them, together with all interest which may have accrued on any money, together with all interest may have accrued on any money, *together with all interest which may have accrued on any money* so deposited by said acter, which the defendants, constituting the said State Dispensary Commission, now have in their possession or under their control, by virtue of the Act of the General Assembly of the State of South Carolina passed at its session held in 1907, creating the said State Dispensary Commission.

And it is further ordered, that each of said receivers do, within five days from the date of this order, give bond as such receivers, in the sum of $25,000.00, with surety or sureties to be approved by this court, or by the United States District Judge for the District of South Carolina.

And, it is further ordered that said receivers be and they are hereby, invested with all the powers and authority usually conferred upon receivers in like cases, and they are fully authorized to institute any and all actions or proceedings, and to take any other steps necessary for the purpose of collecting any assets which may come into their hands by virtue of their appointment as receivers in these causes;

And it is further ordered, adjudged and decreed, that all of the said parties to this cause and all other persons whomsoever, their agents and attorneys, be and they are hereby restrain-
(278) ed and enjoined from interfering in any way with the receivers hereby appointed, or with their possession and control of the money and other property hereby ordered to be transfered to them;

And it is further ordered that all and singular the creditors of the South Carolina State Dispensary be, and each of said creditors is, hereby, restrained and enjoined from prose-

cuting any suit or proceeding for the collection or enforcement of his claim against the defendants, except by leave of this court first had and obtained:

The clerk will, at once certify a copy of this order to each of the receivers named in this order.

J. C. PRITCHARD,
U. S. Circuit Judge.

March 7th, 1908.

Order Fixing Bonds of Complainants.

(279) Filed March 9th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

Wilson Distilling Company et al.
vs.
W. J. Murray et al.
and
The Fleischmann Company
vs.
W. J. Murray et al.
} In Equity.

It is ordered, that within ten days from the date hereof that the complainants in the case of Wilson Distilling Company et al. *vs.* W. J. Murray et al. in addition to the bond already filed, do file an additional bond in the sum of twenty-five hundred dollars, with surety to be approved by the judge of this court.

It is further ordered, that the Fleischmann Company do, within ten days from the date of this order, give the usual injunction bond in the sum of seven thousand five hundred dollars, with surety to be approved by the judge of this court.

It is further ordered, that the defendants have leave to apply at any time, upon ten days' notice to counsel, for an increase of said bonds.

J. C. PRITCHARD,
U. S. Circuit Judge.

Asheville, N. C., March 7th, 1908.

Oath of Joseph A. McCullough, Receiver.

(280) Filed March 13th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

Wilson Distilling Company et al.
versus
W. J. Murray et al.

The Fleischmann Company
versus
W. J. Murray et al.

} Consolidated causes In Equity.

OATH OF RECEIVER.

I, the undersigned, Joseph A. McCullough, having been by an order of the Circuit Court of the United States for the District of South Carolina appointed one of the receivers in the above entitled consolidated causes, do solemnly swear that I will faithfully perform the duties of that office and obey all of the orders of the court. So help me God.

JOS. A. McCULLOUGH.

Subscribed and sworn to before me this the 11th day of March, 1908.

WILTON H. EARLE, [L. S.]
[Seal] Not. Pub. for South Carolina.

Oath of B. F. Arthur, Receiver.

(281) Filed March 12th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

Wilson Distilling Company et al.
versus
W. J. Murray et al.

The Fleischmann Company
versus
W. J. Murray et al.

} Consolidated causes In Equity.

OATH OF RECEIVER.

I, the undersigned B. F. Arthur, having been by an order of the Circuit Court of the United States for the District of

South Carolina appointed one of the receivers in the above entitled consolidated causes, do solemnly swear that I will faithfully perform the duties of that office and obey all of the orders of the court. So help me God.

B. F. ARTHUR.

Subscribed and sworn to before me this the 11th day of March, 1908.

WILTON H. EARLE, [L. S.]
[Seal] Not. Pub. for South Carolina.

Oath of C. K. Henderson, Receiver.

(282) Filed March 13th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

Wilson Distilling Company et al.
versus
W. J. Murray et al.

The Fleischmann Company
versus
W. J. Murray et al.

} Consolidated causes In Equity.

OATH OF RECEIVER.

I, the undersigned C. K. Henderson, having been by an order of the Circuit Court of the United States for the District of South Carolina appointed one of the receivers in the above entitled consolidated causes, do solemnly swear that I will faithfully perform the duties of that office and obey all of the orders of the court. So help me God.

C. K. HENDERSON.

Subscribed and sworn to before me this the 11th day of March, 1908.

WILTON H. EARLE, [L. S.]
[Seal] Not. Pub. for South Carolina.

Surety Bonds. B. F. Arthur.

(283) Filed 12th March, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

Wilson Distilling Company et al.
against
W. J. Murray and others,
and
The Fleischmann Company
against
W. J. Murray and others.
} In Equity.

Know all men by these presents: That we, B. F. Arthur, of the town of Union, County of Union, and State of South Carolina, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, with its principal office in the City of Baltimore, State of Maryland, as surety, are held and firmly bound unto the United States of America in the sum of twenty-five thousand dollars, in lawful money of the United States, to be paid to the United States, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Signed and sealed this tenth day of March, A. D., 1908.

The condition of this obligation is such, that whereas the above named B. F. Arthur was, on the seventh day of March, A. D., 1908, appointed a receiver in the above stated cases pending in said court, and he, the said B. F. Arthur, has accepted said appointment as a receiver with all the duties and obligations pertaining thereunto:

Now, therefore, if the said B. F. Arthur, receiver as aforesaid, shall obey such orders as such court may make in relation to said receivership, and shall faithfully and truly account for all moneys, assets and effects which may come into his posses-
(284) sion as receiver in the above entitled actions, and shall in all respects faithfully perform all his official duties as such receiver, then this obligation to be void; otherwise, to remain in full force and virtue.

B. F. ARTHUR, [Seal]
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By H. N. EDMUNDS, Attorney in fact.

Attest:
JAMES A. CATHCART, Agent.

Signed and sealed in presence of

STANYARN WILSON,
W. T. FOWLER.
As to B. F. Arthur.

M. E. WINGARD,
R. E. CARLISLE.
As to Fidelity & Deposit Company of Maryland.

Bond approved.

WM. H. BRAWLEY,
U. S. District Judge.

Bond of Joseph A. McCullough.

(285) Filed March 14th, 1908.

American Surety Company
of New York.
Capital $2,500,000.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FOURTH JUDICIAL CIRCUIT, STATE OF SOUTH CAROLINA.

Wilson Distilling Company et al.
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} In Equity.

Know all men by these presents, that we, Joseph A. McCullough, of Greenville, Greenville, County, South Carolina, as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, City of New York, and State of New York, as surety, are held and firmly bound unto the United States of America, in the sum of twenty-five thousand dollars ($25,000.00), in lawful money of the United States, to be paid to the said United States; for which payment well and truly to be made, we bind ourselves, and our heirs, executors, administrators and successors, jointly and sev-

erally, by these presents; and the principal hereby waives the benefit of his homestead exemption.

Signed and sealed this 11th day of March, A. D., 1908.

The condition of this obligation is such, that whereas the above named Joseph A. McCullough was on the 7th day of March, A. D., 1908, appointed receiver in the above stated cases pending in said court to take possession of the property of and wind up the business of the State Dispensary of the State of South Carolina, and he, the said Joseph A. McCullough has accepted said trust with all the duties and obligations pertain-
(286) ing thereunto.

Now, therefore, if the said Joseph A. McCullough, receiver as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of said State Dispensary of the State of South Carolina which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said receiver, then this obligation to be void; otherwise to remain in full force and virtue.

JOSEPH A. McCULLOUGH, [Seal]
AMERICAN SURETY COMPANY OF NEW YORK,
By JOSEPH T. ORME,
Resident Vice-President.

Attest:
A. J. ORME,
[Seal] Resident Assistant Secretar-

Approved.

J. C. PRITCHARD,
U. S. Circuit Judge.

STATE OF NEW YORK,
County of New York.

(287) J. F. Kerr, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also complied with and is duly qualified to act as surety under the Act of Con-

gress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," That the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

J. F. KERR.

Subscribed and sworn before me this 20th day of Dec., 1907.

[Seal] E. A. FARRELL,
Notary Public, New York County.
Certificate filed in Albany County.

FINANCIAL STATEMENT SEPTEMBER 30, 1907.

Resources:

Real Estate,	$3,148,837.64
Stocks and bonds, market value,	2,685,442.42
Cash in Banks and Offices,	661,180.08
Premiums in Course of Collection,	234,449.07
Accrued Interest and Rents,	24,863.08
	$6,754,772.29

(288)

Liabilities:

Capital Stock,	$2,500,000.00
Surplus,	2,503,740.18
Reserve for Re-Insurance,	1,126,652.37
Reserve for Contingent Claims,	559,896.03
Accounts payable not due,	64,483.71
	$6,754,772.29

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

(289) The fiirst quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual stockholders meeting was held at the office of the company.

No. 100 Broadway, New York City, on Wednesday, January 15, 1908, at 12 o'clock noon.

"The secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the

American Surety Company of New York:

"Gentlemen:

"The Committee appointed by the Executive Committee of this company at their meeting held Wednesday, December 18, 1907, for the purpose of nominating officers of the company, for the ensuing year, beg leave to report as follows:

"We nominate for

Place.	Resident Vice-Pres.	Resident Assistant Sec.
Atlanta, Ga.	Chas. E. Currier, Edward C. Peters, Jos. T. Orme, M. M. Jackson.	Marion M. Jackson, A. J. Orme, W. G. Leas.

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and counsel, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the com-
(290) pany to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by the resident assistant secretary."

STATE OF NEW YORK,
County of New York.

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have com-

pared the foregoing extracts and transcripts from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions, and that the said resolutions have not been revoked or rescinded.

Given under my hand and seal of the company at the City of New York, this January 30th, 1908.

[Seal] F. J. PARRY,
Assistant Secretary.

Bond of C. K. Henderson.

(291) Filed March 14th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

Wilson Distilling Company et al.
versus
W. J. Murray et al.
The Fleischmann Company
versus
W. J. Murray et al.
} In Equity. Consolidated Causes

BOND OF RECEIVER.

This undertaking made and entered into this 11th day of March, 1908, Witnesseth: that we, C. K. Henderson, as principal, and the United States Fidelity & Guaranty Company as surety do promise and undertake to and with the clerk of the Circuit Court of the United States, for the District of South Carolina, for the benefit for whom it may concern in the penal sum of $25,000, that the said C. K. Henderson will faithfully discharge the duties of receiver in the above entitled consolidated causes and will obey all the orders of the court therein.

In testimony whereof the said C. K. Henderson has hereunto set his hand and seal, and the said United States Fideli-

ty & Guaranty Company has caused these presents to be signed in its corporate name by H. J. Haynsworth and Wm. Goldsmith, Jr., its agents and attorneys in fact and its corporate seal to be hereunto affixed.

C. K. HENDERSON, [Seal]
THE UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.,
By WM. GOLDSMITH, JR., and
H. J. HAYNSWORTH, Attorneys in fact.

Approved:

J. C. PRITCHARD,
U. S. Circuit Judge.

Undertaking on Injunction.

(292) Filed March 16th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company et al.
vs.
W. J. Murray et al.
The Fleischmann Company
vs.
W. J. Murray et al.
} In Equity.

Know all men by these presents, that we, Wilson Distilling Company, as principal, and American Bonding Company of Baltimore, as surety, undertake and become bound to W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton the defendants above named, in the sum of twenty-five hundred dollars ($2,500), lawful money of the United States of America, well and truly to be paid to them; to be void however, if the Wilson Distilling Company shall pay to the defendants above named such damages, not exceeding the sum above specified, as they may sustain by reason of the restraining order and injunction granted by His Honor, J. C. Pritchard, United States Circuit Judge, on the 7th day of March, 1908, if the court shall finally decide that the said plain-

tiff, Wilson Distilling Company was not entitled to said restraining order and injunction.

Dated March 7th, 1908.

WILSON DISTILLING COMPANY, [Seal]
By T. MOULTRIE MORDECAI,
Its Attorney and Solicitor.
AMERICAN BONDING COMPANY
OF BALTIMORE, [Seal]
By T. MOULTRIE MORDECAI,
Attorney in fact.

Witness:

C. J. MURPHY.

[Corporate Seal]

The foregoing bond is approved March 16th, 1908.

WM. H. BRAWLEY,
March 18, 1908. U. S. Judge.

Injunction Bond.

(293) Filed March 16th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

The Fleschmann Company, Complainants, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

INJUNCTION BOND.

Know all men by these presents, that we, The Fleischmann Company, as principal, and The United States Fidelity &

Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, the defendants above named, in the sum of $7,500.00, to the payment of which, well and truly to be made, we bind ourselves and our successors firmly by these presents.

The condition of the foregoing obligation is such that, whereas the Fleischmann Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Ohio, and a citizen of that State, has filed on the chancery side of the Circuit Court of the United States for the District of South Carolina, a bill against the said W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, and has obtained an allowance of an injunction, as prayed for in said bill, from said court.

Now, if the said The Fleischmann Company shall abide the decision of said court, and shall pay all moneys and costs which shall be adjudged against it, in case the said injunction (294) shall be dissolved, then these presents shall be null and void; otherwise, to remain in full force and effect.

In testimony whereof, the said The Fleischmann Company has caused these presents to be signed in its corporate name, by Chas. J. Christie, its Assistant Secretary, and its corporate seal to be hereunto affixed, and the said United States Fidelity and Guaranty Company has caused these presents to be signed in its corporate name by Philip R. Moale, its local agent and by Alf S. Barnard its agent and attorney in fact, and its corporate seal to be hereunto affixed, this the 11th day of March, 1908.

[Seal] THE FLEISCHMANN CO.,

By CHAS. J. CHRISTIE, Asst. Secretary.

THE UNITED STATES FIDELITY & GUARANTY CO.,

By PHILIP R. MOALE, Agt. & Atty. in fact.

THE UNITED STATES FIDELITY & GUARANTY CO., [Seal]

By ALF S. BARNARD, Agt. & Atty. in fact.

Order Authorizing Depositories to Honor Checks.

(295) Filed March 18, 1908.

THE UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA, IN THE CIRCUIT COURT.

Wilson Distilling Company et al.
against
W. J. Murray et al.

The Fleischmann Company
against
W. J. Murray et al.

It appearing to the court: That the National Loan and Exchange Bank of Columbia for the convenience of the Creditors and at the request of the Commission advanced the *pro rata* of the several bank depositories of the Dispensary Fund to pay the several amounts ordered by the court to be paid by the said Commission by its Order of 5th March, 1908, amounting to the sum of one hundred and fifty-three thousand eight hundred and twenty-five and 43/100 ($153,825.43) dollars upon checks of the said Commission drawn on the said several Depository Banks for their *pro rata* share of said amount; and that before said checks could be presented to the said several Banks depositories this court by its order of March 7th, 1908, appointed Receivers of said fund not disturbed; and provision for the payment by the said several depositories of the said checks refunding the said The National Loan and Exchange Bank the money so advanced was inadvertently committed from said order; and the banks are in doubt as to their rights after said order of March 7th to honor said checks and refund their *pro rata* to the said The National Loan and Exchange Bank of Columbia:

It is therefore ordered by the court: On motion of Mr. Green for the said bank; that the several depository banks of the dispensary fund are hereby authorized to honor the checks of the Dispensary Commission in favor of the National Loan and Exchange of Columbia for the purpose and to the extent of reimbursing the said bank for the funds so advanced by it and that the order of this court of March 7th, 1908, appointing Receivers be modified accordingly.

Let a copy of this order be certified by the clerk to each of the several banks depositories of the Dispensary Fund.

J. C. PRITCHARD,
U. S. Circuit Judge.

March 17th, 1908.

Order Converting Bill Into an Intervention and Staying Further Proceedings.

(296) Filed 19th day of March, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON. IN EQUITY.

Garrett & Company
vs.
W. J. Murray et al.

On motion for counsel for plaintiffs in the above entitled cause, it is ordered by the court that the bill heretofore filed in this cause be converted into an intervention in the consolidated cause of Wilson Distilling Company et al. *v.* W. J. Murray et al., and the Fleischmann Company *v.* W. J. Murray et al., and that further proceedings herein be stayed except as an intervention in the said consolidated cause.

It is further ordered and adjudged that the plaintiffs have leave to amend their bill of complaint heretofore filed, in accordance with this order, and in such other respects as they may deem advisable.

This the 17th day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Bill or Intervention of Garrett & Co.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(296-1)

Garrett & Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

Garrett and Company, a corporation, a citizen of the State of North Carolina, residing at Weldon in the Eastern District

of said State, brings this, its bill of complaint against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, citizens and inhabitants of the State and District of South Carolina, the said W. J. Murray residing in the City of Columbia; the said B. F. Arthur in the City of Union; the said John McSween in the City of Timmonsville; the said C. K. Henderson in the City of Aiken and the said Avery Patton in the City of Greenville, in said State.

And therefore your orator complains and says:

1. That the Garrett & Company, complainant, is a corporation, duly chartered and organized under the laws of the State of North Carolina and is a citizen and resident of said State, with its principal place of business in Norfolk, Va.

2. That the defendants are citizens and residents of the State of South Carolina.

3. That the matter in controversy in this action exceeds in value the sum of two thousand dollars ($2,000.00), exclusive of interest and costs, as will hereinafter more fully appear.

(296-2) 4. That in January, 1907, the Legislature of the State of South Carolina enacted a statute abolishing the State Dispensary which has existed for some years and providing for the appointment of a Commission, to be composed of five persons, to wind up the affairs of the State Dispensary.

5. That the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton were legally appointed members of the Commission, and duly accepted and qualified as such some time prior to March 17th, 1907, and have ever since composed the said Commission.

6. That the said statute provides that "It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, and by paying of the proceeds therefrom all the just liabilities at the earliest date practicable.

7. That in December, 1906, your orator sold to the said State Dispensary of the State of South Carolina, through its directors who were the proper officers authorized by law to purchase wines and liquors for said Dispensary, the wines set out

in the statement hereto attached, marked Exhibit "A" and made a part of this bill at the prices shown in said statement. The total sale price of said wines being seven thousand five hundred and eighty-eight dollars and forty-four cents ($7,588.44).

8. That your orator shipped said goods to State Dispensary and the same were accepted by it through its duly authorized officers, and as your orator is informed and believes, were sold by said Dispensary at a large profit.

9. That no part of the price of said wines has ever been paid and the whole thereof was justly due to complainant by said State Dispensary at the time of the appointment of said Commission and still is justly due it. That said wines sold to the said Dispensary were reasonably worth seven thousand five (296-3) hundred and eighty-eight dollars and forty-four cents ($7,588.44).

10. That at the request of the defendants, your orator in April, 1907, sent to them an itemized statement of said indebtedness of the Dispensary to it and also a detailed statement of all the dealings of your orator with said dispensary from 1899 up to 1907.

11. That after a comparison of said statement with the books of the dispensary, the defendants claimed that there were errors in prior accounts of your orator, which has been settled and paid, that would reduce the amount due to the complainant to seven thousand four hundred and twenty-five dollars and ninety-seven cents ($7,425.97), all of which were alleged errors your orators consented to allow, and on April 18th, 1907, the defendants, through their chairman, W. J. Murray, wrote your orator as follows:

"I have credited your account with the invoices, copies of which you sent, and the only difference between our books now appears to be $9.00 and if you will adjust your claim in accordance with the statement mentioned, there will be an adjusted balance due you of $7,425.97. Kindly confirm—."

Your orator did confirm and agree to the said balance and alleges that it has a just claim against the said State Dispensary for said amount.

12. That upon information and belief, the defendants have closed out and disposed of all the stock and personal property of said dispensary, and collected all debts due it, and now have

on hand more than enough money from the proceeds thereof to pay in full all claims against said Dispensary, including that of your orator.

13. That your orator is advised and believes that it is the duty of the defendants to pay the said claim of your orator out of said moneys in their hands, in obedience to directions of said statute under which they were appointed, and that said duty is ministerial.

14. That your orator has demanded of defendants the payment of said claim out of said funds, but they have refused (296-4) and still refuse to pay the same, and have stated that they will not do so.

15. That upon information and belief, the defendants are now about to pay the claim of all other creditors of said Dispensary in full, and turn over the balance of the money that will remain in their hands into the State Treasury of South Carolina or into the School Fund of said State, so that they will have nothing out of which to pay your orators claim.

16. That unless they are restrained by a preliminary injunction, the defendants will so pay out and turn over all of said funds before this suit can be tried, and thus defeat any mandamus the court may issue therein.

17. That said Dispensary have been a State Institution, your honor cannot sue the same for said claims for that it would bebe a suit against the State of South Carolina; that your orator has no adequate remedy at law, and is therefore without remedy except in a court of equity, to procure a writ of mandamus to compel the defendants to perform the duties required of them by said statutes.

18. That the reason the defendants refuse to pay the claim of your orator, upon information and belief, is that they have arbitrarily determined to compel your orator to accept in payment of over six thousand dollars ($6,000.00) thereof, two car loads of old remnants of wines, which they have shipped to Norfolk, Va., after your orators told them that it would not accept or receive the same. The said defendants are seeking to make your orator take said wines at the prices for which they were originally sold.

19. That said lot of wines is composed of the accumulation of remnants left unsold during the last ten or twelve years from various lots of wines sold to said Dispensary by your orator, and represent the least desirable portion of the respective lots, which have been left on hand after the dispensary sold, at a large profit, the most desirable portions. That there is not among said remnants as much as ten per cent. of any one bill of wines.

20. That said lots of wines from which said remnants came were sold to said Dispensary at various times during the past (296-5) ten years and accepted by its proper officers, and all of them had been paid for and the contracts closed before the appointment of defendants to wind up the affairs of said dispensary, and more than ninety per cent. of each lot had been sold by said dispensary at a large profit, the parts so sold representing the most desirable parts of each lot.

21. That the various persons who were in charge of the dispensary at different times during said period were ignorant and inexperienced in the care and storage of wines and the wines bought by the dispensary were frequently, if not usually, negligently, improperly and badly stored and cared for, so that they would by reason thereof become injured and spoil, and your orator alleges, on information and belief, that most, if not all of said remnants of wines are wines which have become injured or spoiled by reason of such improper and bad storage, and that the same is of little or no value. The defendants, however, claim that the wine is in good condition.

22. That the defendants have admitted in conversation that their action in respect to the claim of your orator is not right, but assert that they have the power to do as they please because they cannot be sued for the reason that a suit against them would be a suit against the State; that your orator is helpless and can get nothing but what they give it, and that they are determined that they shall take said remnants for its debt or get nothing.

23. That the said action of the defendants is highhanded, grossly wrong, unfair and against conscience, and is in violation of your orator's contract rights and any alleged law of South Carolina, which they may claim attempts to give them the right or power so to act would be in conflict with the Constitution of the United States, in that it would violate the obligation of a contract, and therefore be unconstitutional and void.

To the end therefore, that your orator may have that relief which it can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or (296-6) affirmation, an answer under oath being hereby expressly waived by your orator, he now prays the court that a writ of mandamus be issued to defendants commanding them to pay the complainants said claim of $7,425.97 out of the said funds in their hands; that a preliminary injunction be issued, restraining them from paying over, or disposing of said funds until the final hearing herein; and that your orator may have such further or other relief in the premises as the nature of the circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna to be directed to the said W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, thereby commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there, full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity.

And your orator will ever pray.

(Signed) E. L. TRAVIS,
(Signed) W. E. DANIEL,
Solicitors for Complainant.

Paul Garrett, being sworn, says that he is President of Garrett & Company, the complainant herein; that the foregoing bill of complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) PAUL GARRETT.

Sworn to and subscribed before me October 9, 1907.

(Signed) CHAS. D. WILDES,
Notary Public, Wake County, N. C.

Exhibit "A."

(296-7) Norfolk, Va., April 17, 1907.

South Carolina State Dispensary,
Columbia, S. C.

To Garrett & Company, Dr.

1916.

12— 3	To Invoice.				
	100 Cs. Sherry	5s	4.25	425.00	
	50 " "	9s	5.10	255.00	
	100 " Port	5s	4.25	425.00	
	50 " "	59s	5.00	250.00	
	100 " Escapernong	5s	4.35	435.00	
	50 " Red Va. Dare	9s	5.00	255.00	
	50 " " "	5s	4.35	217.50	
	50 " Blackberry	5s	4.00	200.00	
	50 " "	9s	4.75	237.50	2,700.00
12—20	To Invoice.				
	1287 ½ gals. Port 00.67½			869.06	
	50 bbls. 51½-52-51-52-51/53-52-48				
	51-51 52-51-51-52-51-52-52-53-52-52				
	-51-52-51-52-51-				
	1269 gals. Sherry Cooking 62½,				
	809.38,			809.38	1,678.44
	51-53-50-52-52-53-52-51-51-52-				
	52-51-52-52-52-52-53-51-53-52-				
	52-51-51-51-53.				
12—22	To Invoice.				
	100 Cs. Sherry	5s	4.35	425.00	
	50 " "	9s	5.10	255.00	
	100 " Port	5s	4.25	425.00	
	50 " "	9s	5.00	250.00	
	100 " Escapernong	5s	4.35	435.00	
	100 " "	9s	5.10	510.00	
	50 " Red Va. Dare	9s	5.10	255.00	
	50 " " " "	5s	4.35	217.50	
	50 " Blackberry	5s	4.00	200.00	
	50 " "	9s	4.75	237.50	3,310.00
	Total				7,588.44

Personally appeared before me C. B. Cole, Secy. & Treas. of Garrett & Company, Inc., who certified that the foregoing and attached statement of account against the South Carolina State Dispensary is true and correct, no part thereof having been paid to the best of his knowledge and belief.

(Signed) GARRETT & COMPANY,
C. B. COLE, Sec. & Treas.

Sworn to and subscribed before me this 17th day of April, 1907.

J. M. JORDAN, JR.
My term of office expires January 7, 1908.

A true copy—Attest:

C. J. MURPHY,
C. C. C. U. S., Dis. S. C.

Answer and Return.

(296-8) Filed November 26th, 1907.

IN THE UNITED STATES CIRCUIT COURT, IN AND FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Garrett & Company, Complainants,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.

The answer and return of the defendants to the complaint and rule served upon them in the above cause to show cause why a peremptory mandamus should not issue commanding them to pay the claim of the plaintiff respectfully shows:

1. That they have no information upon which to form a belief as to the allegations of the first paragraph and, therefore, deny the same.

2. They admit the allegations of the second paragraph.

3. They admit that the plaintiff claims more than $2,000 to be due him from the State of South Carolina as alleged in the third paragraph of the complaint.

4. They admit that the Legislature of South Carolina passed an act which was approved the 16th day of February, 1907, abolishing the State Dispensary, the same being found at page 963 of the 25 Statutes at Large for South Carolina, and they further admit that the Legislature passed an act approved on the 16th day of February, 1907, providing for the appointment of a commission to wind up the affairs of the State Dispensary, which act is found on page 835 of 25 Statutes at Large in South Carolina, and they allege that the act creating such commission conferred upon them all the powers enumerated in the act of the Legislature of South Carolina approved January 24th, (296-9) 1906, and found at page 334 of 25th Statutes at Large for South Carolina, reference to all of which acts is hereby craved and the same, or so much thereof as is pertinent, are parts of this answer and return.

5. They admit that they are and were at the beginning of this suit the members of the said Commission and in discharge of their duties.

6. They admit the allegations of the sixth paragraph of the complaint.

7. That they have not sufficient information on which to form a belief as to the correctness of the allegations of the seventh paragraph and, therefore, deny the same and demand strict proof of the same.

8. That they have not sufficient information upon which to form a belief as to eighth paragraph, and they, therefore, deny the same and demand strict proof thereof.

9. That they deny the allegations of the ninth paragraph of the said complaint.

10 & 11. That as to the tenth and eleventh paragraphs of the said complaint, they allege and say that under the authority and direction of the act creating said Commission, they employed the American Audit Company, a company engaged in the business as public accountants, to make a full and correct adjustment of all of the book entries in the books of the said State Dispensary, and that the said Accountants took up the said work and corresponded in the name of W. J. Murray, the Chairman of the Commission, with the plaintiff as well as with all other creditors, with a view to correcting and properly setting forth the proper book entries that should be made, without authority, however, to bind this Commission or the State of South

Carolina as to the merits of any claim except as to the proper entries to be made, and without any authority to promise payment of any claim, and that the correspondence set forth in the eleventh paragraph was had by said Audit Company, merely looking to the correctness of the books entries, and they are informed and believe that the conclusion reached was correct, (296-10) but whether the conclusion set forth in this petition is the conclusion reached as to the correctness of the entries made in the books, this Commission has not sufficient information upon which to base an affirmation or denial.

12. They deny the allegations of paragraph twelve of the complaint.

13. They deny the allegations of the thirteenth paragraph thereof.

14. They deny the allegations of the fourteenth paragraph and allege that so far from having demanded payment of these defendants, the plaintiff has submitted prospositions offering a discount if the defendants will pay the account and retain all wines that were on hand, which proceeding has not been accepted by this Commission as yet.

15. They deny the allegations in paragraph fifteen of the complaint, and allege that on the very date upon which this bill was presented and the restraining order herein granted they resolved to postpone the payment of any claim against the said Dispensary indefinitely pending certain developments that had come to the knowledge of these defendants, and also pending the final report of the American Audit Company which had not been received.

16. The defendants deny that they are about to pay out or turn over all or any of said funds before this suit can be tried, and deny especially that they are attempting or intend to attempt, to escape any proper liability of the State.

17. They admit the allegations of the seventeenth paragraph of the complaint, except that they deny any inference that this court of equity has the right to issue a mandamus to compel these defendants to discharge their duty, or that a mandamus can be issued by a court of equity of the United States in the Circuit Court in this proceeding.

18. They deny that they have arbitrarily determined to compel your orator to accept in payment a large amount of

(296-11) wines, but, on the other hand, they allege that under the act of the Legislature creating this Commission, they were directed and authorized to return any wines or liquors which were illegally purchased to any of the parties who had sold the same. And they further allege that the plaintiff in his dealings with the State Board of Directors had failed to comply with the law in the form of his bid and in furnishing a chemical analysis of the goods which he sought to furnish, and in nearly every instance in furnishing any bond to carry out in good faith and according to the bid the contract made, and they deny that he complied in any respect with the law regulating sales to the State Dispensary, and allege on information and belief that he sold his goods to the Dispensary at more than the market price, and that this was done continually and by collusion with the State Board of Directors as they are informed and believe, and that in addition to that there was an agreement made by the said plaintiff that any wines that were unsalable could be returned to him, which is shown in Exhibit A., and this Commission, therefore, acting both upon such agreement and upon the law creating the Commission, have returned a large amount of wines to the said plaintiff, and they deny that on the proper investigation of the account and proper scaling of the prices which were excessively large on account of the fact that the bids and advertisements were so arranged that competition *and* was excluded in violation of the Statutes regulating purchases by the State Board that nothing is due the plaintiff upon his account, and they further allege that no bid was filed upon which the alleged sale in December was made and that it was totally illegal and that many sales were made direct to County Dispensers, without being sold properly to the State Board in utter disregard of the law, reference being here craved to the dispensary law regulating sales.

19. That as to paragraph nineteen they allege that all that they know of the character of the wines as at present advised, which were returned, is that they were on hand and unsold and in that condition they came under the terms of the contract which authorized the return of unsalable wines and also under (296-12) the terms of the Statute authorizing them to return wines illegally bought, and they are informed that many of them were returned by County Dispensaries to whom they had been sold direct, illegally under contract to be returned if unsaleable.

20. They deny the allegations of paragraph 20 on information and belief, and allege that there was a continuous open account running for many years between the plaintiff and the

State Dispensary and that at no time has that account been *entire* liquidated.

21. They deny, on information and belief, the allegations of the twenty-first paragraph.

22. They deny the allegations of the twenty-second paragraph of the complaint.

23. They deny the allegations of the twenty-third paragraph of the complaint.

24. They deny that this court has any jurisdiction of the subject matter in that (a) this court has no jurisdiction to entertain an original proceeding for the issuance of a mandamus, and (b) in that upon the face of the bill this is a proceeding against the State, it being in effect an action to enforce specific performance of a contract alleged to have been made by the State with this plaintiff.

25. They deny further that this court, if it had jurisdiction of the subject matter, can under the well settled principle of law, proceed by mandamus to require this Commission to pay the account as prayed on the ground (1) that the account is not an adjudicated account, and (2) that this Commission, under the Statutes creating it, is clothed with the power of court and its action is discretionary, it being given the authority to hear and determine all questions as to the validity of accounts and to withhold the payment of the same and to scale the same if, in their judgment, they are unjust, and its action being entirely discretionary this court has no authority to require it to proceed in any other manner than that in which the Statutes give it authority to proceed, and it is so proceeding and the resolution hereto attached and marked Exhibit E. shows the same.

(296-13) 26. They further deny that there is enough money in the hands of the Commission with which to pay the claims against the State, and they deny that their discretion as to the time in which to pay the claims can be interfered with by mandamus.

27. They allege that they are informed and believe that the plaintiff and the State Board of Directors were guilty of gross irregularities and gross overcharges against the State and so conducted the purchase that such overcharges and irregularities invalidated and rendered illegal the contracts that the plaintiff made with the State Board of Directors, and, therefore,

they are proceeding as a court to fully investigate all of the transactions, and if upon full investigation they decide that there is anything due the plaintiff, it will be promptly paid, but that their action in this matter cannot be controlled by this court by any mandamus proceeding.

28. They allege that heretofore and a long time before the filing of this bill, the plaintiff had instituted its action against this Commission in the court of law and chancery for the City of Norfolk, in the State of Virginia, and had served its writ upon the defendant C. K. Henderson, in which suit has been brought for this same claim against this Commission in that court, and a copy of the writ is hereto attached marked Exhibit C. and a copy of the bill is hereto attached marked Exhibit D. in said proceeding, and they deny the right of this plaintiff to prosecute two actions in two jurisdictions on the same cause of action.

Wherefore they pray that this Rule and proceeding be dismissed.

J. FRASER LYON, Atty.-Gen.
STEVENSON & MATHESON,
Defendants Attorneys.

SOUTH CAROLINA, }
Richland County. }

Personally comes W. J. Murray who on oath says that the foregoing return and answer is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

W. J. MURRAY.

(296-14) Sworn to before me Nov. 12, 1907.

[L. S.] JOHN E. HOLMS,
Not. Pub. S. C.

Exhibit A. 1.

Hon. H. H. Crum,
Columbia, S. C.

Dear Sir:

(296-15) We are constantly getting inquiries from private parties in S. C. for wines, We send a price list in these in-

stances higher than the prices of the Dispensary, and write them about as follows, in order to induce the business to go to the Dispensary. The difficulty is that the dispensers will not keep a good stock. I would like to have the privilege of writing a personal letter to each dispenser pointing out the necessity of keeping a good stock on hand, Of course, I shall not write them unless I have your permission, or the permission of the Board. Let me know at once what is the best thing to be done in these cases.

We are finishing up your order to day, and will be very glad to have your requisition for what goods you will need during Nov. so that we can be putting them up at every favorable opportunity.

Yours truly,

PAUL GARRETT.

Weldon, N. C., Oct. 28th, 1902.

G. T.

See copy attached.

A. 2.

(296-16) October 28th, 1902.

Mr. T. S. Richbourg,
Dillon, S. C.

Dear Sir:

Replying to your kind inquiry of the 27th, we herewith hand you price list of our wines, but beg to suggest that the dispensary should have a full assortment of our standard wines in stock, which by special arrangements with the Dispensary will be furnished you there, just as cheap as we could ship them from here, and every bottle bearing our label is guaranteed satisfactory or the money will be refunded you by the Dispensary, However, should you be unable to get what wines you want at the Dispensary, it will afford us pleasure to supply you direct.

Awaiting your reply, we are,

Yours very truly,

G. T.

A. 3.

Weldon, N. C., Nov. 28, 1902.

Hon. Board of Directors of S. C. Dispensary,
Columbia, S. C.

It is again our pleasure to submit bids for your stock of wines for next quarter. Samples have been sent to the State Treasurer by express as directed, one copy of this bid going in the box of samples and the other copy mailed direct to the Treasurer.

Notwithstanding a rumor of a combination of the Glass men, which advances the cost of bottles, our contracts up to this time are holding good, and we are able to renew the quotations heretofore made.

It is useless to bore you with a repetition of what we have (296-17) often laid before you. The extension of the work in your State, is limited only by our ability to get the local dispensers to carry a good stock at all times.

No cases of dissatisfaction with the wine have been reported to us that we have not immediately adjusted, and from the numerous inquiries we are getting from all over the State, we are confident that our goods are giving universal satisfaction.

We appreciate very highly the confidence which has been shown us in the past, and which has been reposed in our goods and methods, and we beg to express the hope that a sufficiently large order will be placed in this purchase (as in the last) and sufficient time given us to enable us to get the goods up without any rush, and to keep a good supply at all the local dispensaries, With kindest regards to each and all and hoping to have the pleasure of a long continuance of the pleasant relations which have existed between us in the past, we beg to remain,

Yours very truly,

GARRETT & CO.

G. T.

A. 4.

Weldon, N. C., Nov. 28th, 1902.

Garrett & Co's bid for wines, etc., for S. C. Dispensary.

Here is the price list.

All bulk goods as per proposition made in Sept. any other wines not, enumerated, we will undertake to supply at corre-

spondingly low figures, in either glass or bulk, as per previous proposition.

The same guarantee applies to all goods, namely, of satisfaction to the consumer or the money may be refunded and charged to us.

Thanking you for the courtesy which has always characterized all of our relations with us, and hoping to merit by constantly improved goods and service, the continuance, we beg to remain,

Yours very truly,

GARRETT & CO.

A. 5.

(296-18) Weldon, N. C., May 28th, 1903.

To the Hon. Board of Control,
Columbia, S. C.

Now if ever a bottle of our wines has been unsatisfactory, and not made good by the firm, it is because the matter has not been brought to our attention. The question is, which pays better, to pay a reasonable price for goods, and make a sure profit, and build up the wine business, to the betterment of morals, and the profit of the Dispensary, or to buy cheap wines, and get the trade in the condition it was five years ago? It is true that we are charging the same for wines as when the stamp tax was on, but the cost of other things has more than offset this cost. All supplies have advanced steadily from 10 to 25% so that we are really making less profit on the Dispensary business now than we did while the stamp tax was on. If your Board will kindly give the writer permission to appear before it, we can make it very plain to you that it is injudicious to get into handling the cheap trashy wines which will bring discredit on the Purchasing Board from a class of people who drink wines, and they are the influential class. Remember the guarantee we give is that we don't want pay for a single bottle of wine that the consumer is not pleased with. This covers the whole case. On the other hand, we take all the risks, abide by the experiences of that time, and we are content to abide by the result. Look at the figures: In 1901 the Dispensary bought of us about $20,000.00 worth of wines, which it sold at an average profit of 40%, making a net profit of $8,000.00 without the risk of a dollar. In 1902, the sales were about the same, just a little less in the latter part of the year, and making the same ratio of profits. Now how do these figures contrast with an

actual loss, while the Dispensary was buying wines of a cheap class, and having the spoil on their hands, with great loss and annoyance?

GARRETT & CO.,
Per PAUL GARRETT.

A. 6.

(296-19) Norfolk, Va., 8, 22, 1904.

Mr. G. H. Charles,
Columbia, S. C.

Dear Sir:

We are just in receipt of letter from Mr. Clark enclosing orders for direct shipment and we beg to ask you to kindly have mailed to us at once a good supply of shipping certifications for these goods.

Thanking you in advance and hoping you will call on us whenever we can serve you, we beg to remain,

Yours very truly,

GARRETT & CO.

C. B. B.

A. 7.

STATE OF SOUTH CAROLINA,
County of Bamberg.

Personally appeared before me E. L. Price, who being duly sworn, says, that he was Dispenser at Bamberg, S. C., from about Nov., 1901, to Feby. 16th, 1907; that during that time Messrs. Garrett & Co., or their agent and representative Mr. Clark, on one occasion did ship one case quarts Domestic wine replacing an even number of quarts that had become leaky and unsalable, requesting him at the same time to destroy these goods when replaced.

E. L. PRICE.

Sworn to before me this the 15th day of November, 1907.

G. A. JENNINGS, [L.S.]
Notary Public, S. C.

A. 8.

STATE OF SOUTH CAROLINA,
County of Bamberg.

(296-20) Personally appeared W. O. Tatum, who being duly sworn, deposes and says that he was Commissioner of the S. C. Dispensary from March 1st, 1904, to Feby. 16th, 1907, and that during that period he on divers occasions was told by Mr. Clark, representing Garrett & Co., that Garrett & Co., would receive back and replace with fresh goods all wines not in good condition, either from mutilated labels, leaky bottles, shop-worn or anything which impaired their appearance or sale. Further that he was informed by Mr. Clark, that his house, Garrett & Co., had such a contract or understanding with the State Board of Directors, either in writing or oral, deponent does not know. Further that such an exchange was made from the State Dispensary during his administration.

W. O. TATUM.

Sworn to before me this 15th day of November, 1907.

[L. S.] E. L. PRICE,
Notary Public.

A. 9.

STATE OF SOUTH CAROLINA,
County of

Personally comes John Bell Towell, who on oath says that he occupied the position as one of the members of the State Board of Directors of the State Dispensary of South Carolina, and that he was familiar with the purchases of wines and brandies made from Garrett & Company, and deponent further says, during his period of two years as a member of said Board of Directors, said Board, had absolute control of all purchases made for the South Carolina Dispensary, and the understanding with said Garrett and Co. for all wines purchased from them was guaranteed, and at any time, any wines found unsalable or spoilt either in the State Dispensary or in the County Dispensaries, was to be returned to said Garrett & Company under said guarantee, they allowed their representative Mr. Clark,

to visit County Dispensaries to get orders and ship direct, said (296-21) orders coming through the office of the State Board of Directors.

JOHN BELL TOWELL.

Sworn to before me this 15 day of November, 1907.

BARRETT JONES,
Notary Public for South Carolina.

A. 10.

STATE OF SOUTH CAROLINA,
County of Richland.

Personally comes Thomas W. Collina, who on oath says that he was connected with the State Dispensary for some years, and deponent further says that he was personally acquainted with Mr. Clarke, a representative of Garrett & Company, and that he has often told him that all wines, etc., bought of Garrett & Company was guaranteed, and any unsalable goods would at all times be taken back and exchanged for fresh and salable goods, and that the State had nothing to lose in the purchase of goods from Garrett & Company.

THOMAS W. COLLINA.

Sworn to before me this 14th Nov., 1907.

[L. S.]

L. T. LEVIN, JR.,
Notary Public S. C.

A. 11.

STATE OF SOUTH CAROLINA,
County of Richland.

Personally comes M. M. Mobley, who on oath says that he occupied the position of book-keeper at the State Dispensary in South Carolina for quite a while, and on several occasions he has heard Mr. Clark who was representative of Garrett & Company, say that his firm would take back all unsalable wines sold to the South Carolina State Dispensary by said Garrett & Company.

M. H. MOBLEY.

Sworn to before me this 14th day of November, 1907.

[L. S.]

THOS. W. COLLINS.
Notary Public for S. C.

A. 12.

SOUTH CAROLINA,
County of Richland.

(296-22) Personally comes J. L. Thorpe, who on oath says that he was connected with the Dispensary at Aiken, South Carolina, for some years, and that Garrett & Company had a travelling man by the name of Clark who came and solicited orders from the said Dispensary, and told said Dispenser that he was taking orders for Garrett & Company from the Dispensaries in the State and having the goods shipped directly to the Dispensaries instead of through the State Dispensary.

Deponent further says that the said agent agreed that any unsalable stock should be returned and that the odds and ends which were returned to the State Dispensary as unsalable came largely from the said Garrett & Company in that way, and that all said purchases were made with the distinct understanding that all unsalable goods should be returned and charged to Garrett & Company.

J. L. THORPE.

Sworn to before me this 11th day of November, 1907.

THOMAS W. COLLINS,
[L. S.] Notary Public S. C.

A. 13.

SOUTH CAROLINA,
County of Aiken.

Personally comes G. T. Holley, who on oath says that he was connected with the Dispensary at Aiken, South Carolina, for some years, and that Garrett & Company had a travelling man, by the name of Clark who came and solicited orders from the said Dispensary, and told said Dispenser that he was taking orders for Garrett & Company from the dispensaries in the State and having the goods shipped directly to the Dispensaries instead of through the State Dispensary. Deponent further says that the said agent agreed that any unsalable stock should be returned and that the odds and ends which were returned (296-23) from Aiken to the State Dispensary as unsalable came largely from the said Garrett & Company in that way, and that all said purchases were made with the distinct un-

derstanding that all unsalable goods should be returned and charged to Garrett & Company.

G. T. HOLLEY.

Sworn to before me this 5th day of November, 1907.

C. K. HENDERSON,
Not. Pub.

Ex. B. 1.

RESOLUTION OF COMMISSION.

Constituting a court of investigation and acting under authority of the power conferred upon us by the act of the legislature of South Carolina, approved 16th of February, 1907, which gives us the right as a winding up commission, to withhold payment of any amounts due any parties by the State Dispensary until such parties have placed themselves with all books and papers within the jurisdiction of this commission for examination under oath, and such examination of the books and papers as the commission deem proper, these books must include the books of original entry, journal, cash book, ledger, etc., covering all the transactions with the State Dispensary as well as all other parties, and covering such dates as the commission may require, you are hereby notified to appear with your books and papers. Pending this action your claim is held up. Should you have any good reason why this action should not be required of you, you may submit it and if your reason is in the judgment of the commission a good one we will arrange a date with you when you can be heard.

Ex. C. 1.

Commonwealth of Virginia to the Sergeant of the City of Norfolk—Greeting:

We command you that you summon W. J. Murray, John McSween, C. K. Henderson, B. F. Arthur and Avery Patton, to appear in the Clerk's office of our Court of Law and (296-24) Chancery of the City of Norfolk, at the rules day to be holden for the said court, on the first Monday in October, 1907, to answer Garrett & Co., a corporation, of a plea of tres-

pass on the case in assumpsit. Damages $10,000.00.

And have then and there this writ.

Witness, James V. Trehy, Clerk of our said Court at his office this 15th day of September, 1907, in the 132nd year of our foundation.

Teste:

JAMES W. TREHY, Clerk.
By JUNIUS A. COLEMAN, D. C.

Ex. D. 1.

In the Court of Law and Chancery of the City of Norfolk filed 2 Oct. Rules, 1907.

Garrett & Co., a corporation, Plaintiff,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, Defendants.
} In Assumpsit.

Garrett & Co., a corporation duly organized and existing under the laws of the State of North Carolina, plaintiff in this case, complain of W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, and Avery Patton, defendants, in this case of a plea of trespass on the case in assumpsit for this, to-wit: that heretofore, to-wit, prior to and during the month of December, 1906, the State Dispensary of the State of South Carolina was a body organized and existing under the laws of the State of South Carolina, through which and whereby the said State of South Carolina, bought wines and spirituous liquors, and sold and dispensed the same throughout the said State of South Carolina; that under and by virtue of the laws of the said State of South Carolina, said State Dispensary was authorized and empowered to purchase wines and spirituous liquors and to pay for and to sell the same in the usual course of trade, the said State Dispensary being constituted by said laws of South Carolina an agency of the State of South Carolina for the purchase and sale of wines and spirituous liquors (296-25) and the said plaintiff avers that in the month of December, 1906, the said Garrett & Company at the special instance and request of the said State Dispensary, sold and delivered to the said State Dispensary certain wines and other spirituous liquors, for which said wines and other spirituous liquors the said State Dispensary promised and agreed to pay to the said Garrett & Company the sum of $7,588.44 whenever the said State Dispensary should thereafter be requested. And

the said plaintiff avers that the said goods so sold and delivered as aforesaid were duly accepted by the said State Dispensary, which has since sold all of said goods to purchasers thereof, and has received payment for the same and in such sale or sales has made large profits. And the said plaintiff further avers that afterwards, to-wit: during the month of January, 1907, by an Act of the Legislature of the State of South Carolina, the said State Dispensary was abolished and its powers revoked and annulled and provision was made for the appointment by the Governor of the said State of South Carolina of a Commission of five persons to be known as the "State Dispensary Commission," which said Commission was empowered and directed to sell all the stock and personal property of said Dispensary, and out of the proceeds thereof to pay all debts and just liabilities of the aforesaid State Dispensary. That subsequently, to-wit: in pursuance of said authority, the Governor of the State of South Carolina appointed as the members of said State Dispensary Commission the said defendants, the said W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, who subsequently duly qualified as the members of said Commission and entered upon the discharge of their duties. And the said plaintiff avers that by virtue of the said law of the said State of South Carolina the said defendants have disposed of the stock and personal property of said dispensary, and had and now have in hand from the proceeds thereof ample money sufficient to pay the said sum of money due to the plaintiff as hereinbefore mentioned and which by law they are directed to do and all other debts and liabilities (296-26) of said State Dispensary. And the said plaintiff avers that the said defendants, being by the laws aforesaid required and directed to pay the debts of said State Dispensary out of said funds, and having in hand sufficient thereof to pay the same, it became and was and is the duty of said defendants under said statute to pay the said plaintiff the said sum of money above demanded, and it being their duty so do *to* the said defendants, afterwards, to-wit: on the 18th day of April, 1907, promised the said plaintiff to pay it the said sum of money above mentioned. Yet the said defendants, although often requested have arbitrarily and in conscious disregard of their said duty, failed and refused to pay the said sum of money above demanded or any part thereof and the said plaintiff avers that such refusal of the said defendants to pay the said plaintiff as aforesaid, they have arbitrarily, wilfully and knowingly disregarded and violated the duty imposed upon them by the said laws of the State of South Carolina, in consequence of which said wilful, intentional and illegal disregard and violation of their duty in the premises, the said defendants, hav-

ing so unlawfully, wrongfully and arbitrarily deprived the plaintiff of the payment of its said claim from the said funds in the hands of said defendants intended for the payment of the same, and the said plaintiff being without the power to sue the said State of South Carolina for said goods sold and delivered as aforesaid, the said defendants have become and are liable to the said plaintiff for the said sum of money above mentioned. And being so liable, the said defendants, on the day and year last aforesaid, promised to pay the said plaintiff the said sum of money above demanded whenever the said defendants should be thereafter requested and although having been often so requested, the said defendants have hitherto wholly neglected and refused to pay to the said plaintiff the said sum of money hereinabove mentioned to the damage of the said plaintiff, $10,000.00.

2nd Count. And for this to-wit: that heretofore, to-wit: on the 18th day of April, 1907, the said defendants were indebted to the said plaintiff in the sum of $7,588.44 for the price (296-27) and value of goods before that time sold and delivered by the plaintiff to the defendants at their special instance and request; and also in the sum of $7,588.44 for the price and value of work before that time done by the plaintiff for the defendants at their special instance and request; and also in the sum of $7,588.44 for money before that time had and received by the defendants to the use of the said plaintiff, and being so indebted the said defendants in consideration thereof, afterwards, to-wit: on the day and year last aforesaid undertook, and faithfully promised the said plaintiff and to pay it the said several sums of money in this count mentioned when the said defendants should be thereun*der* afterwards requested.

Third Count. And for this also, that heretofore, to-wit: on the day and year last aforesaid, the defendants accounted with the said plaintiff of and concerning divers other sums of money before that time due owing to the said plaintiff, and then in arrears and unpaid; and upon such accounting, the said defendants were found in arrear and indebted to the said plaintiff in the further sum of $7,588.44 and being so found in errear and indebted, the said defendants in consideration thereof undertook and then faithfully promised the said plaintiff to pay it the said sum of money in this last count mentioned when they the said defendants should be thereunto afterwards requested.

Yet the said defendants not regarding their said several promises and undertakings have not yet paid to the said plain-

tiff, the said several sums of money or any or either of them or any part thereof, although often requested so to do, but to pay the same have hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said plaintiff of $10,000.00 and therefore it institutes this action of trespass on the case in assumpsit.

LOYAL, TAYLOR & WHITE, p. q.

A Copy Teste:

JAMES V. TREHY, Clerk.
By JUNIUS A. COLEMAN, D. C.

Notice of Motion to Vacate Injunction and Receivership Orders.

(297) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

Wilson Distilling Company et al.
vs.
W. J. Murray and others,
and
The Fleischmann Company,
vs.
W. J. Murray and others.
} In Equity.

To Messrs. T. Moultrie Mordecai, Frank Carter, H. C. Chedester, Merrick and Barnard, and George B. Lester, Solicitors for all the complainants.

You will please take notice that the undersigned attorneys for the State Dispensary Commission will move before his Honor, J. C. Pritchard, Circuit Judge, at Asheville, N. C., at his chambers, at ten o'clock in the forenoon on March 27th, 1908, or as soon thereafter as counsel can be heard, for an order revoking the former orders of the said court, granting an injunction and appointing receivers, on the ground that the Supreme Court of South Carolina has now construed the Statutes of South Carolina and the Constitution of the said State, under which the complainants claim their rights, and has construed it differently from the said Circuit Courts construction which construction if followed, ousts the jurisdiction of the Circuit Court.

The motion will be made upon the pleadings and returns and affidavits already before the court, and on the decision of (298) the Supreme Court of the State of South Carolina, and the record upon which it is based in the case of the State of South Carolina ex rel. J. Fraser Lyon *vs.* W. J. Murray and others, a formal petition being presented setting up the said facts.

J. FRASER LYON, Attorney General.
STEVENSON & MATTHESSON,
ABNEY & MULLER,
ANDERSON, FELDER, ROUNDTREE & WILSON,
Defendants Attorneys.

March 19th, 1908.

SOUTH CAROLINA, }
Chesterfield County. }

Personally comes W. F. Stevenson who on oath says that he mailed copies of the within notice to T. Moultrie Mordecai and Merrick and Barnard at their respective residences and prepaid the postage thereon, said letters being mailed from Columbia, S. C., on the 19th day of March, 1908.

W. F. STEVENSON.

Sworn to before me March 20th, 1908.

[Seal] U. R. BROOKS,
Clerk Supreme Court of South Carolina.

Petition for Mandamus.

(299) Filed March 27th, 1908.

THE STATE OF SOUTH CAROLINA, IN THE SUPREME COURT, ORIGINAL JURISDICTION.

The State of South Carolina, ex rel. J. Fraser Lyon, as Attorney-General, Petitioner,
against
W. J. Murray, John McSween, C. K. Henderson, Avery Patton, and B. F. Arthur as State Dispensary Commission, Respondents.

PETITION FOR MANDAMUS.

To the Honorable Y. J. Pope, Chief Justice of the Supreme Court of the State of South Carolina:

Your petitioner respectfully shows to this honorable court:

1.

That the respondents, W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, compose the State Dispensary Commission and are officers and agents of the State of South Carolina, appointed by the Governor under the terms of an Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs, approved the 16th day of February, A. D., 1907; that the said respondents have each given bond for the faithful performance of the duties required, in the sum of ten thousand dollars, and have heretofore entered upon and are now holding the said office of State Dispensary Commission.

2.

That under the terms and provisions of the Act hereinbefore referred to, the said State Dispensary Commission has collected assets of the State Dispensary amounting to several hundred thousand dollars in money, and they have the same now on deposit and subject to their check, in various banks in the (300) State of South Carolina, all of which money, property and assets arising from the business of the State Dispensary is the property of the State of South Carolina.

3.

That by an Act of the General Assembly, approved the 24th day of February, 1908, which Act is now of force, the sum of $15,000 was appropriated for the use of the Attorney-General's office, and the State Dispensary Commission was required to pay the same into the State Treasury out of any funds in its hands arising from the business or property of the State Dispensary; that the said Act further provides that the said sum shall be paid out by the State Treasurer upon the warrant of the Comptroller-General, and accounted for in the same manner as other funds appropriated for the use of the Attorney General's office.

4.

That Hon. R. H. Jennings, Treasurer of the State of South Carolina, has made demand upon the respondents that the said sum of money shall be turned into the State Treasury as provided for in the said Act approved 24th day of February, 1908, and the respondents have failed and refused to comply with the provisions of said Act of the Legislature and to turn into the State Treasury the said sum of $15,000, which amount they now have in their charge and custody as the property of the State and subject to the order of the Legislature.

5.

That the sum of $15,000 was appropriated for the use of the Attorney-General's office to meet expenses of any criminal prosecutions that have been or may be commenced against any person or persons charged with violation of the law in any manner connected with the late institution called the State Dispensary, and is to be used solely for governmental and public purposes.

6.

(301) That although the act required to be done by the respondents is purely a ministerial duty, they have, nevertheless, unjustly refused to perform the same as required by law.

Wherefore your petitioner prays that an order to issue authorizing and requiring the respondents to turn the sum of $15,000 into the Treasury of the State of South Carolina, in accordance with the terms of the Act appropriating the same,

approved 24th day of February, 1908; and for such other and further relief as may be just and proper in the premises.

J. FRASER LYON,
Attorney-General.

[Verified]

Rule to Show Cause.

IN THE SUPREME COURT.

(302)

Original Jurisdiction.

The State of South Carolina, *ex relatione* J. Fraser Lyon, as Attorney-General, Petitioner,
against
W. J. Murray, John McSween, C. K. Henderson, Avery Patton, and B. F. Arthur, Respondents.

The State of South Carolina to W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur as State Dispensary Commission:

Whereas, an Act of the Legislature was approved on the 24th day of February, 1908, authorizing and requiring you as State Dispensary Commission to pay into the State Treasury the sum of fifteen thousand dollars, out of any funds in your hands arising from the business or property of the State Dispensary, and, nevertheless, you have unjustly refused to turn the same into the State Treasury as required by said Act to the injury of the State of South Carolina, as appears to us by the complaint in the above stated case;

Now, therefore, we, being willing that speedy justice be done in this behalf, do command and enjoin you, and each of you, that immediately after the receipt of this order, you show cause before the Supreme Court at Columbia, S. C., on the 4th day of March, 1908, at ten o'clock in the forenoon, why a mandamus should not be granted as prayed for in said petition.

It is further ordered that copies of this order and of the petition herein be served on the respondents.

Y. J. POPE, C. J.

THE STATE OF SOUTH CAROLINA,

IN THE SUPREME COURT.

Original Jurisdiction.

State
vs.
W. J. Murray, John McSween, C. K. Henderson, Avery Patton, and B. F. Arthur.
} Return.

(303) The return of the defendants above named, to the petition of plaintiff, shows to this court.

1.

That they admit the allegations of fact set forth in said petition, but they allege that the ownership of the funds is a matter of construction of law, and they commit that construction to this court.

2.

They allege that they are charged with the duty of determining the amount of the indebtedness of the State of South Carolina, growing out of the said Dispensary, and applying so much of the funds in their hands as may be necessary to the settlement of the same, and the expenses of this Commission, and that said funds are in their hands for that purpose, and for the purpose of paying any balance that may be left thereafter to the said Treasurer for the uses of the State.

3.

That they are restrained and enjoined by orders of the United States Circuit Court for this Circuit from paying any funds into the hands of the State Treasurer, in two cases, to-wit: the case of the Wilson Distilling Company *vs.* W. J. Murray and others, a copy of their bill of complaint being hereto attached and marked "Exhibit A," along with the restraining order in said case, and an amended bill that has just been filed, And further, that they are restrained by an order in the case of the Fleischmann Company *vs.* W. J. Murray and others, a (304) copy of which bill and restraining order and oral decision as announced is hereto attached and marked "Exhibit B."

4.

The return of the respondents to all the cases, in addition to denying allegations of fraud and conspiracy, denied the jurisdiction and maintained the following positions:

First.

The funds in the hands of the "State Dispensary Commission" created by the Act of February 16, 1907, (Acts of 1907, p. 835) belong to and are the property of the State, which has the right to control the same, which, through the said Commission as its agent, is in possession thereof.

Second.

The said "State Dispensary Commission" is the mere agent or instrumentality of the State vested with the ministrial function of winding up the State's Dispensary business, selling the goods and property on hand, collecting the debts due the State in connection with said business and holding the proceeds for the State and subject to its right of disposition thereof. And vested also with the judicial function of investigating all claims against the State in connection with said business and determinating the validity thereof.

And also vested with the ministerial function of paying from the funds held by them for the State such of the said claims as they may upon said investigation find and decide to be just liabilities of the State.

Third.

The pending action is in effect an action against the State, because it seeks to lay hold of the funds belonging to the State and in the hands of the said Commission as its agent and through the said Commission in the possession of the State, and further seeks to have such funds applied to the payment of alleged liabilities of the State.

(305) So that the State is a necessary party to the action.

Fourth.

The State cannot be held to have waived its constitutional immunity from suit by the said Act creating the "State Dispensary Commission" except to the extent of the remedies therein provided for and allowed to claimants for the collection of such debts as may be due them by the State in connec-

tion with its said Dispensary business, and, therefore, such claimants are limited to the remedies therein provided for and allowed.

Fifth.

The said Act creating the "State Dispensary Commission" having passed and the remedies therein provided for having been allowed as a purely voluntary matter on the part of the Legislature of the State, the said Act is subject to be repealed and the allowance of the remedies therein provided for is subject to be recalled at any time at the pleasure of the Legislature and in its discretion.

That they are, therefore, informed and believe that they have no right to pay in the money which they are called upon to pay, under these circumstances, and therefore they pray that the petition may be dismissed.

W. F. STEVENSON,
Attorney for Commission.

Exhibit A.

(Copy.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Wilson Distilling Co., Complainant, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.	Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

Wilson Distilling Company, a corporation duly created, organized and existing under and by virtue of the laws of the (306) State of New Jersey, and a resident and citizen of said State of New Jersey, having its principal place of business at Baltimore, in the State of Maryland, brings this, its bill of complaint, against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, citizens and inhabitants of the State and District of South Carolina, the said W. J. Murray residing in the city of Columbia; the said John McSween in the city of Timmonsville; the said B. F. Arthur

in the city of Union; the said C. K. Henderson in the city of Aiken and the said Avery Patton in the city of Greenville, in said State.

And therefore your orator complains and says:

1.

That the Wilson Distilling Company, complainant, is a body corporate under the laws of the State of New Jersey, and is a resident and citizen of the said State of New Jersey, having its principal place of business in the city of Baltimore, in the State of Maryland.

2.

That the defendants are citizens and residents of the State of South Carolina.

3.

That the matter in controversy in this action exceeds in value the sum of two thousand dollars exclusive of interest and cost, as will hereinafter more fully appear.

4.

That on or about the 16th day of February, 1907, the Legislature of the State of South Carolina enacted a statute providing for the appointment of a Commission, to be composed of five persons, to wind up the affairs of the State Dispensary, which had theretofore existed in said State for several years, and which had theretofore been abolished by a prior enactment of the Legislature of said State.

5.

That the defendants, W. J. Murray, John McSween, B. (307) F. Arthur, C. K. Henderson and Avery Patton, were duly appointed members of said Commission, and duly accepted and qualified as such prior to March 17, 1907, and have ever since composed the said Commission.

6.

That said statute provides *inter alia* "It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries, by disposing of all

goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable."

7.

That on or about the — day of ———, 1906, your orator sold to the said State Dispensary of the State of South Carolina, through its directors, who were the proper officers authorized by law to purchase wines and liquors for said Dispensary, whiskies and liquors to the amount and value of two thousand nine hundred and seventy-nine and 12-100 dollars ($2,979.12) and your orator shipped said goods to the State Dispensary and the same were accepted by it through its duly authorized officers, and as your orator is informed and believes the same were sold by said Dispensary at a large profit; that an invoice and account of the goods so sold and delivered were duly rendered by your orator to said State Dispensary through its proper officers and agents, and the same was duly accepted and approved and the amount thereof became due to your orator as upon account stated.

8.

That no part of the price of said whiskies and liquors has ever been paid, and the whole thereof was justly due the complainant by said State Dispensary at the time of the appointment of said Commission, and still is justly due it. That said whiskies and liquors so sold to the said Dispensary were reasonably worth the sum of two thousand nine hundred and sev-
(308) enty-nine and twelve one hundredths dollars ($2,-979.12).

9.

Your orator further alleges, upon information and belief, that the defendants have closed out and disposed of all the stock and personal property of said Dispensary, and collected all debts due it, and that said defendants now have on hand funds sufficient to satisfy and pay off all just and proper claims against said Dispensary, but your orator is advised and believes, and so charges, that said defendants deny that there is enough money in the hands of the Commission with which to pay said claims, and that said defendants have lately made such denial in a verified answer filed by them in a cause pending in this court, wherein Garrett & Company are complainants and the defendants above named are defendants.

Your orators are informed, advised and believe and aver the fact to be, that if any such deficiency exists, as is claimed by said defendants, that the same has occurred by reason of the fact that said defendants have approved and allowed, and are about to pay, a large number of claims which have not been properly audited and many of which are for improper and excessive amounts and others of which, for large amounts, are not valid claims against said Dispensary or against the fund in the hands of the defendants by reason of the fact that they are for sales illegally made, in that they did not comply with the laws of said State governing sales to said Dispensary.

10.

Your orator further alleges, upon information and belief, that said defendants propose to, and unless restrained by the order of this court will, arbitrarily pay a portion of the claims against said Dispensary and pay over the balance and a large part of the funds in their hands as aforesaid into the public treasury of the State of South Carolina, And your orator alleges that such proposed action of said defendants would operate to defeat the just claim of your orator and of other persons having just claims against the Dispensary, and against said (309) fund.

11.

Your orator is advised and believes that the enactment of the Legislature of South Carolina, as aforesaid, imposes upon the defendants the duty to pay the claim of your orator out of said moneys in their hands.

12.

That your orator has demanded of defendants the payment of said claim out of said fund, but they have failed and refused and still fail and refuse to pay the same.

13.

That unless they are restrained by preliminary injunction, the defendants will pay *will pay* out on improper claims a large part of the funds in their hands aforesaid and will cover into the public treasury of the State of South Carolina a large part of said fund, to the irreparable damage of your orator and of

other persons having just claims against said Dispensary and against said fund in the hands of the defendants.

14.

Each and every allegation of fact in this bill contained is made upon information and belief of the solicitor for the complainant, by whom the same is verified.

15.

This suit is brought by your orator on its own behalf and on behalf of all other persons having just claims against said State Dispensary, and against the fund in the hands of the defendants, who may hereafter join herein.

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by your orator, he now prays the court that a preliminary injunction be issued restraining said defendants and each and every of them from paying over or disposing of said funds to (310) any creditor or to the public treasurer of the State of South Carolina until the proper amounts due each creditor shall have been first duly ascertained and determined as this court may direct until the final hearing herein; and that your orator may have such other, further and general relief in the premises as the nature of the circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna to be directed to the said W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, thereby commanding them at a certain time and under a certain penalty therein to be limited personally, to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity.

And your orator will ever pray.

(Signed) T. M. MORDECAI,
FRANK CARTER, and
H. C. CHEDESTER,
Solicitors for Complainant.

Verification of Bill of Complaint.

THE UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA.

(311)
Wilson Distilling Company
vs.
W. J. Murray et al.

Frank Carter, being sworn, says that he is one of the solicitors for the complainant in the above entitled suit, and that he verifies this bill of complaint herein on behalf of said complainant; and said verification is made by this affiant for the reason that said complainant is a foreign corporation and that no officer or agent of said corporation capable of making this verification is present within the district or place where said bill of complaint was prepared, to the knowledge or belief of this affiant that the foregoing bill of complaint is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

(Signed) FRANK CARTER.

Sworn to and subscribed before me this the 30th day of December, 1907.

GILMER WELCH,
Notary Public.

[Notarial Seal]

A true copy—Attest:

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(314)
Wilson Distilling Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Defendants.

Order.

Upon hearing read the verified bill of complaint herein, praying for an injunction restraining the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, their successors, agents and attorneys, from paying over or disposing of the funds in their hands as Commissioners for the purpose of winding up the State Dispensary of

the State of South Carolina, to any creditor or to the Public Treasurer of said State, until the proper amount due each creditor shall have first been duly ascertained and determined, as the court may direct, until the final hearing herein, and it appearing therefrom that the said defendants may proceed to pay out and pay over said funds to the irreparable damage of the complainant, unless restrained therefrom:

Now, in consideration thereof, and upon motion of T. M. Mordecai, Frank Carter and H. C. Chedester, solicitors for the complainant.

It is ordered, that said defendants, their successors, agents and attorneys, and each and every of them, be, and they are hereby, restrained from paying over or disposing of the funds in their hands as aforesaid, to any creditor or to the Public Treasurer of said State, until the proper amount due each creditor shall have first been ascertained and determined, as the court may direct, until the fruther order of this court.

And it is further ordered, that said defendants be, and they are hereby, required to show cause, if any they have, before me, on the 11th day of January, 1908, at the United States Court-house, in Asheville, in the State of North Carolina, at 10 o'clock in the forenoon, why the said defendants, their successors, agents and attorneys, and each and every of them, should (315) not be so restrained until the final hereing herein.

And it is further ordered, that a copy of this order and of the bill of complaint herein be served upon said defendants.

And it is further ordered, that the complainant above named do execute a bond in the penalty of five thousand dollars ($5,000) conditioned for the payment to the defendants of all damages and costs they or either of them may sustain by reason of this order, should the same hereafter be adjudged to have been improvidently made, as to all or any of them; that said bond shall be duly approved by either of the Circuit Judges of this Circuit, or by any of the District Judges of the District of South Carolina, or by the Clerk of this Court at Asheville, N. C.

And it is further ordered, that any defendant hereto have leave to move before me at any time before the hearing herein ordered upon five days notice to the solicitors for the complainant, to vacate this order or any part thereof, as to such defendant.

Done at Asheville, North Carolina, at Chambers, this the 30th day of December, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

A true copy—Attest:

[Seal]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

(316) AT CHARLESTON.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants. } In Equity.

Order.

Upon motion of solicitors for complainants, it is ordered that The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Company, all of Columbia, in the State of South Carolina. The Bank of Timmonsville, of Timmonsville, in said State. The Peoples Bank of Union, of Union, in said State. The Bank of Aiken, of Aiken, in said State. The Piedmont Savings and Investment Company, of Greenville, in said State. The Merchants and Farmers Bank of Cheraw, in said State, and the Bank of Camden, of Camden, in said State, be, and they each of them hereby are, made parties defendant in this cause, and it is hereby ordered that subpœnas issue for said parties according to the course and practice of this court.

And it is further ordered that the complainants have leave to file an amended and supplemental bill of complaint in this cause the same to relate and have effect, so far as may be, as of the date of the filing of the original bill of complaint herein.

This the 19th day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON.

(317)

Wilson Distilling Company, Anheuser-Busch Brewing Association and Charles J. Gallagher, Jr., and Edward Burton, Partners as Gallagher & Burton, and John M. Cranston, trading as Jack Cranston Company, Complainants,

vs.

W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson, Avery Patton, The National Loan and Exchange Bank, of Columbia, South Carolina; The Palmetto National Bank, of Columbia, South Carolina; The Columbia Savings and Trust Company, of Columbia, South Carolina; The Bank of Timmonsville, of Timmonsville, South Carolina; The People's Bank of Union, of Union, South Carolina; The Bank of Aiken, of Aiken, South Carolina; The Piedmont Savings and Investment Company, of Greenville, South Carolina; The Merchants' and Farmers' Bank, of Cheraw, South Carolina, and The Bank of Camden, of Camden, South Carolina, Defendants.

In Equity.

Amended and Supplemental Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

Wilson Distilling Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen and resident of said State, Anheuser-Busch Brewing Association, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and a citizen and resident of said State, and Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, both citizens and residents of the State of Pennsylvania, and John M. Cranston, trading as Jack Cranston Company, a citizen and resident of the State of Georgia, by leave of the court bring this their amended and supplemental

bill of complaint against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of the State of South Carolina, and said defendants individually, all of whom are citizens and (318) residents of said State of South Carolina and the following named corporations, to-wit: The National Loan and Exchange Bank of Columbia, South Carolina, The Palmetto National Bank of Columbia, South Carolina, The Columbia Savings and Trust Company of Columbia, South Carolina, The Bank of Timmonsville, of Timmonsville, South Carolina, The People Bank of Union, of Union, South Carolina, The Bank of Aiken, of Aiken, South Carolina, The Piedmont Savings and Investment Company of Greenville, South Carolina, The Merchants and Farmers Bank of Cheraw, South Carolina and The Bank of Camden, of Camden, South Carolina, all of whom are citizens and residents of the State of South Carolina and thereupon your orators complain and say:

1.

That your orator, Wilson Distilling Company, at all times hereafter mentioned was, and still is, a body corporate under the laws of the State of New Jersey, and is a citizen and resident of said State of New Jersey, having its principal place of business in the City of Baltimore, in the State of Maryland; that your orator, Anheuser-Busch Brewing Association, at all times hereinafter mentioned was, and still is a body corporate under the laws of the State of Missouri, and is a citizen and resident of said last mentioned State, having its principal place of business in the City of St. Louis, in the State of Missouri; that your orators, Charles J. Gallagher, Jr., and Edawrd Burton, partners as Gallagher & Burton, at all times hereinafter mentioned, were and still are, citizens and residents of the State of Pennsylvania; and your orator, John M. Cranston, trading as Jack Cranston Company, at all times hereinafter mentioned was and still is, a citizen and resident of the State of Georgia; and that all said complainants are citizens of the United States and of the States in which they respectively reside as aforesaid.

2.

That the defendants, and each and every of them, are citizens and residents of the State of South Carolina, the said W. (319) J. Murray, residing in the City of Columbia, the said John McSween, residing in the City of Timmonsville, the said B. F. Arthur, residing in the City of Union, the said C. K. Henderson, residing in the City of Aiken, the said Avery Patton

residing in the City of Greenville, the said The National Loan and Exchange Bank is a body corporate residing and having its principal place of business in the City of Columbia, the said The Palmetto National Bank is a body corporate, residing and having its principal place of business in the City of Columbia; the said The Columbia Savings and Trust Company is a body corporate residing and having its principal place of business in the City of Columbia; the said The Bank of Timmonsville, is a body corporate, residing and having its principal place of business in the City of Timmonsville; the said The People Bank of Union is a body corporate, residing and having its principal place of business in the City of Union; the said Bank of Aiken, is a *corporate*, residing and having its principal place of business in the City of Aiken, the said The Piedmont Savings and Investment Company is a body corporate, residing and having its principal place of business in the City of Greenville; the said The Merchants and Farmers Bank is a body corporate, residing and having its principal place of business in the City of Cheraw, and the said the Bank of Camden is a body corporate, residing and having its principal place of business in the City of Camden, all in the State of South Carolina.

3.

That the matter in controversy in this action exceeds in amount and value the sum of two thousand dollars, exclusive of interest and costs, as will hereinafter more fully appear.

4.

Your orators further show that the General Assembly of the State of South Carolina, at its regular session of 1892, passed an Act entitled "An Act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State, except as herein provided," the same being Act No. 28 of said session, which was duly approved December 24, 1892, which (320) said Act is hereby expressly referred to, and asked to be taken as a part hereof; said Act provided *inter alia*, "That on and after the first day of July, A. D., 1893, the manufacture, barter, sale, or exchange, or keeping or offering for sale, barter, trade or exchange within this State of any spirituous malt, vinous, fermented or other intoxicating liquor, or any compound or mixture thereof, by whatever name called, which will produce intoxication, by any person, business firm, corporation or association, shall be regulated and conducted as provided in this Act;" and provided further for a Board of Control, and also provided for the appointment of a Commis-

sioner, who was required, under such rules and regulations as might be made by said State Board of Control, to purchase all alcoholic liquors for lawful use within said State, and to sell the same to the various County Dispensaries as provided in said Act. Said Act further provided that all money arising from the sale of liquors by the said Commissioner should be deposited with the State Treasurer, to be held by him as a separate and distinct fund, with which fund the said Treasurer was required to keep a separate account, and further provided that the expenses incurred in conducting said business should be paid out of said fund upon warrants drawn by said Commissioner and duly approved by said State Board of Control, and no part of said fund could be lawfully paid out by said Treasurer except upon warrants so issued.

The business and monopoly thus established became known and was thenceforth recognized in the legislation of said State as the State Dispensary. By subsequent legislation amendatory of said Act of 1892, the method of conducting the business of said State Dispensary underwent various changes; the Board of Directors of the State Dispensary was thereafter created, and upon it were devolved most, if not all of the powers and duties of said State Board of Control and certain of the duties and powers of said Commissioner, including the duty and power to purchase all alcoholic liquors and other supplies for said State Dispensary; but all moneys received from said business were always required to be kept and maintained as a separate (321) and distinct fund, subject to be drawn upon for the purpose of paying the expenses incurred in the conduct of said business.

5.

And your orators further show that while the Act set out in the last preceding paragraph hereof, amended as aforesaid, was still in force, your orators severally duly sold to said Board of Directors of the State Dispensary, at prices mutually satisfactory and agreed upon, large quantities of alcoholic liquors, which were duly accepted and sold by the said Directors of the State Dispensary at a substantial profit in accordance with said Act, and the proceeds of such sales were, in due course of administration, deposited in and became a part of the fund hereinbefore referred to, all of which will hereinafter more fully appear.

6.

And your orators further show that afterwards, at its session held in the year 1907, the General Assembly of the State of South Carolina passed an Act providing for the abolition

of said State Dispensary, which act was duly approved on February 16, 1907, and section 47 of which is as follows:

"Section 47. The State Dispensary is hereby abolished, and all Acts and parts of Acts inconsistent with this Act are hereby repealed; Provided, That this Act shall not have the effect of preventing any violation of the present criminal law relating to the Dispensary being punished as now provided by law for offences heretofore committed."

That at the same session the said General Assembly of the State of South Carolina, passed another Act, approved on the same day as said Act abolishing said State Dispensary, to-wit: February 16, 1907, entitled "An Act to provide for the disposition of all property connected with the State Dispensary, and to wind up its affairs," which said Act is in words and figures as follows:

SESSION LAWS, S. C., 1907.

"No. 402.

(322) "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs.

"Section 1. Be it enacted by the General Assembly of the State of South Carolina that immediately upon the approval of this Act, the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required in the sum of $10,000.

"Sec. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

"Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: Provided, That no alcoholic liquors or beers shall be disposed of within the State, except to County Dispensary

Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any times in the past and to take testimony, either within or without the State: Provided, further, That all payments shall be made in gold and silver coin of the United States, in United States Currency or in National Bank Notes.

(323) Sec. 4. The Compensation of each member of said Commission shall be $5.00 per day for each day actually employed about the business and actual expenses for the time engaged: Provided, that they shall receive no compensation for services rendered on this Commission after January 1st, 1908.

Sec. 5. The said Commission shall pay to the State Treasurer after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employees as they may deem necessary and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

Sec. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to investigate the affairs of the Dispensary, as prescribed by an Act to Provide for the Investigation of the Dispensary, approved January 24th, A. D., 1906, be, and hereby is, conferred upon the Commission provided for under this Act: Provided, That for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is,

authorized and empowered, separately and individually or collectively, to exercise the power and authority herein conferred upon the whole *Committee*.

"Approved the 16th day of February, A. D., 1907."

(324) That within a short time thereafter the Commission provided in said Act was created by the appointment of the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, as Commissioners, and said defendants having duly qualified and organized pursuant to the said Act, became and do now constitute the State Dispensary Commission, and as such are charged with the execution of all the powers conferred, and the performance of all the duties imposed upon said Commission by the said Act.

7.

And your orators further show that immediately upon their qualifications as Commissioners and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties and, in accordance with the Act providing for their appointment, took possession and control of the entire business and property of the said State Dispensary, including the money which at that time was deposited with the State Treasurer to the credit of the Board of Directors of said State Dispensary, and said defendants have sold the property of said State Dispensary, except real estate, and collected many of the debts due to the said State Dispensary, and now have in their hands, and deposited with the several defendant banks and in other depositories within the State of South Carolina, the names of which are unknown to your orators, the proceeds arising from said sales and collections, which, together with the sum so received from said State Treasurer amounts to about eight hundred thousand dollars ($800,000) as your orators are informed and believe, and the sum so held in the hands of said defendants is applicable to the payment of the just liabilities of said State Dispensary, and to the other uses and purposes designated in said Act.

8.

And your orators further show that prior to the passage of said Acts of February 16, 1907, and while the said State Dispensary was still engaged in business, said complainant, Wilson Distilling Company, duly sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a

large quantity of valuable alcoholic liquors, which were duly (325) received and accepted by said State Dispensary, and have been sold and disposed of by it at a substantial profit; that said sales and deliveries were in all respects regular and legal, and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a lawful contract, promise and agreement, that said complainant should be paid, the prices charged therefor; by reason whereof said State Dispensary became and at the time the defendants, Murray, McSween, Arthur, Henderson and Patton, took charge of said business and property was, and still is, justly indebted to said complainant in the just and full sum of twenty-nine hundred and seventy-nine and 12/100 dollars ($2,979.12), that no part of said sum has been paid, and that the same constitutes in favor of said complainant, a just liability of said State Dispensary, and by reason of the matters and things hereinbefore alleged, and particularly by the terms of said Act of February 16, 1907, last above mentioned, said funds in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants, Murray, McSween, Arthur, Henderson and Patton were and are charged with the ministerial duty to pay the same to said complainant.

9.

And your orators further show that, prior to passage of said Act of February 16th, 1907, and while the said State Dispensary was still engaged in business, said complainant, Anheuser-Busch Brewing Association, duly sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable alcoholic liquors, which were duly received and accepted by said State Dispensary and have been sold and disposed of by it at a substantial profit; that said sales and deliveries were in all respects, regular and legal and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a lawful contract, promise and agreement, that said complainant should be paid the prices charged therefor; by reason whereof said State Dispensary became, and at the time of the passage of said Act, and at the time the defendants, Murray, McSween, Henderson, Arthur and Patton took charge of said business and (326) property, was, and still is, justly indebted to said complainant in the just and full sum of nine thousand five hundred and fifty-one dollars (*19*,551) that no part of said sum has been paid, and that said sum constitutes, in favor of said complainant, a just liability of said State Dispensary, and by reason of the matters and things hereinbefore alleged, and particu-

larly by the terms of said Act of February 16, 1907, last above mentioned, said funds in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants Murray, McSween, Arthur, Henderson and Patton were and are charged with the ministerial duty to pay the same to said complainant.

10.

And your orators further show that, prior to the passage of said Act of February 16, 1907, and while the said State Dispensary was still engaged in business, said complainants, Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, duly sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable alcoholic liquors, which were duly received and accepted by said State Dispensary, and have been sold and disposed of by it at substantial profit, that said sales and deliveries were in all respects regular and legal, and were made upon orders properly and lawfully given by persons duly authorized to give such orders, and under a lawful contract, promise and agreement that said complainants should be paid the prices charged therefor; by reason whereof the said State Dispensary became, and at the time of the passage of said Act of February 16th, 1907, and at the time the defendants, Murray, McSween, Arthur, Henderson & Patton, took charge of said business and property, was, and still is, justly indebted to said complainants, which said indebtedness now amounts to the just and full sum and balance of five thousand three hundred and one and 41/100 dollars ($5,301), that no part of said sum (327) has been paid, and that said sum constitutes in favor of said complainants a just liability of said State Dispensary and, by reason of the matters and things hereinbefore alleged, and particularly by the terms of said Act of February 16, 1907, last above mentioned, said funds in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants, Murray, McSween, Arthur, Henderson & Patton, were and are charged with the ministerial duty to pay the same to said complainants.

11.

And your orators further show that, prior to the passage of said Act of February 16, 1907, and while the said State Dispensary was still engaged in business, said complainant, John M. Cranston, trading as Jack Cranston Company, duly sold and delivered to it, at prices which were entirely reasonable

and mutually satisfactory, a large quantity of valuable *valuable* alcoholic liquors, which were duly received and accepted by said State Dispensary, and have been sold and disposed of by it at a substantial profit; that said sales and deliveries were in all respects regular and legal, and were made upon orders properly and lawfully given by persons fully authorized to give such orders, and under a lawful contract, promise and agreement that said complainant should be paid the prices charged therefor; by reason whereof the said State Dispensary became and at the time of the passage of said Act of February 16th, 1907, and at the time the defendants, Murray, McSween, Arthur, Henderson and Patton took charge of said business and property, was, and still is, justly indebted to said complainant in the just and full sum of five thousand and fifty-one and 50/100 dollars ($5,051.50) that no part of said sum has been paid, and that said sum constitutes in favor of said complainant a just liability of said State Dispensary, and, by reason of the matters and things hereinbefore alleged, and particularly by the terms of said Act of February 16, 1907, last above mentioned, said funds in the hands of said defendants became, was and is impressed with a trust for the payment thereof, and said defendants, Murray, McSween, Arthur, Henderson and Patton were and are charged with the ministerial duty to pay the same to said complainant.

(328) 12.

And your orators further show that, as they are informed and believe, the defendants, Murray, McSween, Arthur, Henderson & Patton, have received from the sale of the property of the said Dispensary and the collections of debts due it, and now have in their hands on deposit in the defendant banks and other depositories, a large sum of money, amounting to eight hundred thousand dollars ($800,000) or thereabouts, and that said sum if properly preserved and applied, will be amply sufficient to pay off and discharge the claims of your orators and all other just liabilities of said State Dispensary, which said liabilities do not, as your orators are informed and believe, exceed the sum of six hundred and nine thousand dollars ($609,000), all which facts will more fully appear from the report made by said defendants to the Governor of the State of South Carolina, on or about the fourth day of January, 1908, to which report reference is hereby made.

13.

And your orators further show that, as they are informed, advised and believe, the money received by the defendants,

Murray, McSween, Arthur, Henderson and Patton, and held by them as herein before alleged, having been placed in their possession for the specific purpose of paying all the just liabilities of the said State Dispensary, became and now constitutes a trust fund in the hands of said defendants, and the said defendants hold the same as trustees for your orators, and the other creditors of the said State Dispensary, and said defendants became, were and are charged with the ministerial duty of paying all said just liabilities of said State Dispensary to your orators and to the other persons, firms, corporations, and associations respectively entitled thereto.

(329) 14.

And your orators further show that all the money realized from the sale of the property of the said State Dispensary and the collection of debts due to it pursuant to the provisions of the Act aforesaid, has been from time to time as received by the defendants constituting the State Dispensary Commission, and is now deposited to credit of said Commission, in the defendant banks and other depositories in the State of South Carolina subject to withdrawal only by said Commission and no part of said money is in the Treasury of the State of South Carolina or has ever been mingled with any funds belonging to said State.

15.

And your orators, further show that said defendants, Murray, McSween, Arthur, Henderson and Patton, have abused and are abusing the trusts reposed in them as aforesaid in manner and the particulars following, that is to say:

(a) They have wrongfully and unlawfully failed and refused to pay the just claims of your orators and of other persons, firms and corporations having just claims against the said State Dispensary and in and upon said trust funds, and have wrongfully and unlawfully failed and refused to pay the just liabilities of said State Dispensary at the earliest date practicable, as required by said Act of February 16, 1907.

(b) They have unlawfully, and for the wrongful purpose of avoiding, delaying and defeating the payment of the just liabilities of the said State Dispensary, denied their said trust, and denied that they owed any duty to the creditors of the said State Dispensary.

(c) They have wrongfully and unlawfully exceeded the powers conferred upon them by law and have usurped and presumed to exercise the powers of a court and have unlawfully attempted to arrogate to themselves exclusive jurisdiction of all claims against said State Dispensary and against the funds in their hands.

(d) The powers and functions so unlawfully and wrong-
(330) fully usurped by them they have exercised in a partial, unfair and oppressive manner,, and the hearings and proceedings had by them upon the claims of persons, firms and corporations who allege themselves to be creditors of said State Dispensary and to be entitled to share in said fund have not been designed chiefly, if at all, to ascertain the just liabilities of said State Dispensary, but have had for their principal purpose the provision of some more or less plausible excuse for refusing to pay the just liabilities of said State Dispensary and the procurement of evidence to be used by the Attorney General of said State in his proposed criminal prosecutions of alleged Dispensary grafters so-called, and in furtherance of this latter design they have wrongfully required the attendance of non-resident persons as witnesses upon claims against said fund with the sole or principal object of enabling such Attorney General to have criminal process executed upon said persons while within the jurisdiction of said State in obedience to said requirement, and they have knowingly and wrongfully acquiesced in the wrongful refusal of the said Attorney General, to grant immunity from arrest to said non-resident persons while present in said State in obedience to said requirement, and at the same time have wrongfully refused to pass upon or allow such claims without the personal presence of such non-resident persons at their hearings within said State.

(e) They are wrongfully seeking, or they wrongfully acquiesce in other persons seeking for them, an amendment to said Act of 1907, having for its purpose the legalizing of their usurpations of the powers and functions of a court, and their wrongful claim of exclusive original jurisdiction, as such court, of all claims against said Dispensary and against said fund in their hands, as aforesaid.

(331) (f) They wrongfully seek, by the usurpations aforesaid and through the proposed legislation aforesaid to place said fund beyond the reach of this court and every other regular organized court of general jurisdiction, and thereby render it impossible for your orators and other persons having just claims against said State Dispensary and against said fund to realize

anything upon their said claims, through any legal proceedings, or otherwise, except such amounts as they, in the exercise of the alleged exclusive jurisdiction aforesaid, may be pleased to allow to them.

(g) They deny the right of your orators and other persons having just claims against said Dispensary and against said fund to have their said claims litigated in a court of general jurisdiction, and are attempting, through the proposed legislation aforesaid, to make such denial effectual.

And all and every the unlawful and wrongful acts and doings aforesaid they still continue and threaten to do, to the great wrong and irreparable injury of your orators.

16.

And your orators further show that said defendants, by their conduct and usurpations aforesaid, and through the proposed legislation aforesaid, seek to deny to your orators and all other persons having just claims against the State Dispensary and against said fund, the right of trial by jury guaranteed by the Constitution of the State of South Carolina, and they further seek to deprive your orators, and all other persons having just claims against said State Dispensary and against said fund, of their property without due process of law, and to deny to them the equal protection of the laws, in violation of their rights under the Constitution of the United States and Article XIV., Section 1, of the Amendments thereof, the protection whereof is hereby expressly claimed by your orators.

17.

And your orators further show that there are a large number of persons claiming to be creditors of the said State Dis-
(332) pensary and seeking to collect from the defendants various sums ranging in amount from one, or a few, to many thousands of dollars; that some of said persons, for the purpose of compelling the payment of their debts, have already brought suit against said defendants, and others are, as your orators are informed and believe, threatening to institute similar actions; and if said defendants shall be required or permitted to defend a multiplicity of said suits in order to determine the validity of each claim against them, and shall be allowed to defer the payments of all claims until the final termination of said suits, a large part of the funds in their hands will be wasted in expensive litigation and court costs, and a great wrong, injustice and injury will be done to your orators, and to all other persons hav-

ing just claims against said State Dispensary and against said fund.

18.

Each and every allegation of fact in this bill of complaint contained is made upon the information and belief of the solicitor for the complainant by whom the same is verified.

19.

This suit is brought by your orators on their own behalf and on behalf of all other persons having just claims against said State Dispensary and against said fund in the hands of said defendants, who may hereafter desire to join herein and to contribute to the expenses hereof.

In consideration whereof, and for as much as your orators are without remedy and can obtain adequate relief only in a court of equity, and to the end that the defendants may be prevented from committing further wrongs and trespasses against the rights of your orators, and for the purpose of preserving the fund in the hands of the defendants and of enforcing the rights and equities of your orators in the same, and preventing further waste, loss and damage by reason of the facts alleged in this bill, your orators pray:

(1) That this Honorable Court will forthwith appoint a (333) receiver to take charge of and administer as a trust fund all the money now in the hands of the defendants arising out of the sale of property belonging to said State Dispensary of South Carolina, or from the collection of debts due it.

(2) That the defendants, their agents, servants, attorneys, employees and depositories, be restrained and enjoined from disposing of or paying out, or in any manner interfering further with the said fund or any part thereof, except to transfer the same to the receiver appointed by the court.

(3) That it be referred to a Master to ascertain and determine the amount due to your orators and other creditors upon their claims against the said State Dispensary and against said fund in the hands of said defendants, and that a decree be entered ordering and directing that the amounts so found to be due be immediately paid to your orators respectively. That the defendants be required to set forth an account of all and every sum or sums of money received by them, or either of them, or which ought to have been received by them, or which has been received by any person or persons by their or either

of their orders, or for their or either of their use, from the sale of any property of said State Dispensary or the collection of any debt or debts due to it, and when and from whom, and from what in particular, all and every such sums were respectively received, and where deposited and held, and how the same, respectively, have been applied or disposed of.

And that your orators have such other and further relief in the premises, and as to the court may seem meet and proper. And may it please your honors to grant unto your orators a writ of injunction conformable to the prayer of this bill, and also a writ of subpœna directed to all the defendants not heretofore served with subpœna commanding them, and each of them, to appear and answer this bill of complaint, but not under oath, discovery and answer under oath being hereby expressly waived as to all and every of the defendants herein, and to stand to, perform and abide such orders, directions and decrees, in the (334) premises as to the court shall seem meet or be required by the principles of equity and good conscience.

(Signed) T. MOULTRIE MORDECAI,
FRANK CARTER, and
H. C. CHEDESTER,
Solicitors for Complainants.

Verification of Bill of Complaint.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

(335)

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.

Frank Carter, being sworn, says that he is one of the solicitors for the complainants in the above entitled suit, and that he verified this amended and supplemental bill of complaint herein on behalf of said complainants; that said verification is made by this affiant for the reason that said Wilson Distilling Company and said Anheuser-Busch Brewing Association are foreign corporations, and that no officer or agent of said corporations, or either of them, capable of making said verification is present within the District of South Carolina or at the place where said bill of complaint was prepared, to the knowledge or belief of this affiant, and that said Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher and Burton and John M. Cranston, trading as Jack Cranston Company, are non-residents of

the State and District of South Carolina and neither of said parties is present within said District of South Carolina, or at the place where said bill of complaint was prepared, to the knowledge or belief of this affiant, that the foregoing bill of complaint was prepared to the knowledge or belief of this affiant; that the foregoing bill of complaint is true of his own knowledge, except as to those matters therein stated upon information and belief and as to those matters he believes it to be true.

(Signed) FRANK CARTER.

Sworn to and subscribed before me this the 19th day of February, 1908.

(Signed) JOSEPH P. BRADY,
Clerk U. S. Circuit Court for Eastern District of Virginia.

Upon the back of said Amended and Supplemental Bill of Complaint appears the following endorsement:

(336) "Filed by leave of Court this February 19th, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT CHARLESTON. IN EQUITY.

(337)

Wilson Distilling Co. et al., Complainants,
vs.
W. J. Murray et al., Defendants.

Order to Show Cause.

Upon considering the amended and supplemental bill of complaint this day filed in the above entitled cause, it is now, on motion of the solicitors for the complainants, ordered and adjudged that the defendants be and appear before the undersigned Judge, at his Chambers, in Asheville, North Carolina, at 10 o'clock A. M., on the 29th day of February, 1908, and show cause, if any they have, why the relief prayed for in said bill shall not be granted, and why a receiver shall not be appointed and injunction issued as therein prayed.

Let a copy of this order, together with a copy of said amended and supplemental bill of complaint, be forthwith served upon each of the defendants.

This the 19th day of February, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Fourth Circuit.
District of South Carolina.

(338)

The President of the United States of America to The National Loan and Exchange Bank, of Columbia, South Carolina, The Palmetto National Bank, of Columbia, South Carolina; The Columbia Savings and Trust Company of Columbia, South Carolina; The Bank of Timmonsville, of Timmonsville, South Carolina; The Peoples Bank of Union, of Union, South Carolina; The Bank of Aiken, of Aiken, South Carolina; The Piedmont Savings and Investment Company of Greenville, South Carolina; The Merchants and Farmers Bank of Cheraw, South Carolina; and The Bank of Camden, Camden, South Carolina, Defendants:

You are hereby strictly commanded and firmly enjoined that all manner of excuses being laid aside, you be and appear before the Judges of the Circuit Court of the United States for the District of South Carolina, at Charleston, on Monday the 6th day of April, 1908, twenty days after the service thereof; then and there true and perfect answer to make upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the Amended and Supplemental Bill of Complaint of Wilson Distilling Company, a body corporate under the laws of the State of New Jersey and a citizen and resident of said State; Anheuser-Busch Brewing Association, a body corporate under the laws of the State of Missouri, and a citizen and resident of said State; Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher and Burton, citizens and residents of the State of Pennsylvania; and John M. Cranston, trading as Jack Cranston Company, a citizen and resident of the State of Georgia.

And, also, That you do, on the rules day next immediately after the day appointed and expressed, file, or cause to be filed, in the Registry of said Court, your plea, answer or demurrer, to the said bill of complaint.

(339) Herein fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in the District aforesaid, the —— day of February, in the year of our Lords one thousand nine hundred and eight, and in the one hundred and thirty-second year of the Sovereignty and Independence of the United States of America.

T. MOULTRIE MORDECAI,
FRANK CARTER and
H. C. CHEDESTER,
Complainant's Solicitors.

[Seal of Court]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit, in the Clerk's office of the Circuit Court of the United States for the District of South Carolina, on or before first Monday of April, 1908, otherwise the bill will be taken *pro confesso* against you.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Exhibit B.

(340)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleischmann Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of South Carolina:

The Fleischmann Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio,

and a citizen of said State, brings this, its bill against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of the State of South Carolina, and said defendants individually, all of whom are citizens and residents of said State of South Carolina, and, thereupon, your orator complains and says:

I.

That your orator, the Fleischmann Company, was at all times hereinafter mentioned, and still is, a corporation, duly created, organized and existing, under and by virtue of the laws of the State of Ohio and is a citizen and resident thereof, having its principal office in the City of Cincinnati, in said State, and that the defendant W. J. Murray, is a citizen and resident of the State of South Carolina, residing at Columbia, in said State; the defendant John McSween, is a citizen and resident of said State of South Carolina, residing at Timmons-
(341) ville, of said State of South Carolina; the defendant B. F. Arthur, is a citizen and resident of the said State of South Carolina, residing at Union, in said State; that the defendant C. K. Henderson, is a citizen and resident of the State of South Carolina, residing at Aiken, in said State, and the defendant Avery Patton, is a citizen and resident of the State of South Carolina, residing at Greenville, in said State.

II.

And your orator further shows that many years prior to the passage of the Act hereinafter mentioned, there was duly created and established by law, in the State of South Carolina, an institution for the purpose of buying, selling and distributing alcoholic liquor within said State, known as the State Dispensary, and that by the terms of the law creating and establishing said Dispensary, the managing agents or officers thereof were duly authorized, directed and empowered to purchase in its name and on its behalf, all kinds of spirituous, vinous and malt liquors, and to pledge the credit of the said State Dispensary for the payment of the same.

III.

And your orator further shows that the General Assembly of the State of South Carolina, at its session held in the year 1907, for the purpose of discontinuing said State Dispensary, disposing of its assets, and paying off its creditors, passed an

Act entitled "An Act to provide for the Disposition of all property Connected with the State Dispensary and to Wind up its affairs," which said Act is in words and figures as follows:

"SESSION LAWS, S. C., 1907.

"No. 402.

"An Act to provide for the disposition of all property connected with the State Dispensary, and to wind up its affairs.

"Sec. 1. Be it enacted by the General Assembly of the State of South Carolina, that immediately upon the approval of this Act, the Governor shall appoint a Commission of well known business men consisting of five members, none of whom (342) shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

"Sec. 2. Said Commission shall immediately organize by the election of a Chairman and a Secretary from their number.

Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: Provided, that no alcoholic liquors or beers shall be disposed of within the State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations, from whom purchased, and for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General and such expert accountants and stenographers, and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: Provided, further, that all payments shall be made in gold and silver coin of the United States, in United States Currency or in National Bank Notes.

Sec. 4. The compensation of each member of said Commission shall be $5.00 per day for each day actually employed about the business and actual expenses for the time engaged: Provided, that they shall receive no compensation for services (343) rendered on this Commission after January 1st, 1908.

Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus fund on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employes as they may deem necessary, and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

Sec. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation, of the Dispensary, approved January 24th, A. D., 1906, be and hereby is, conferred upon the Commission provided for under this Act; provided, that for purpose of investigation of the affairs of the Dispensary as herein provided each and every member of said Commission be and hereby is, authorized and empowered separately and individually, or collectively to exercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D., 1907.

IV.

That the said act was duly approved on the 16th day of February, 1907, and within a short time thereafter the Commission therein provided for was created by the appointment of the defendants, as Commissioners, and said defendants hav- (344) ing duly qualified and organized pursuant to said Act, became, and do now constitute the State Dispensary Commission, and as such are charged with the execution of all the

powers conferred and the performance of all the duties imposed upon said Commission by the said Act.

V.

That, immediately upon their qualifications and organization as hereinbefore alleged, the defendants entered upon the discharge of said duties, and in accordance with the directions contained in said Act, took possession and control of the entire business and property of the State Dispensary, and have, as your orator is informed and believes, sold said property and collected the debts due to said State Dispensary and the proceeds arising from said sale and collections are, or ought to be, in the hands of said defendants, applicable to the payment of the liabilities of said State Dispensary, and to the other uses and purposes designated in said Act.

VI.

And your orator further shows that, prior to the passage of the said Act of 1907, providing for a sale of the property of the said State Dispensary, and the winding up of its affairs, and while the said State Dispensary was still engaged in business, your orator sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable whiskies and other spirituous liquors, all of which whiskies and liquors were received and accepted by said State Dispensary, and had been, except as hereinafter alleged, sold or disposed of by it at a substantial profit; that the sales so made by your orator were, in every respect, regular and legal and were made upon orders properly and lawfully given by the persons duly authorized to give such orders; and the whiskies were delivered to said State Dispensary under a contract, promise and agreement, that your orator should be paid the prices charged therefor and the said State Dispensary became and was at the time of the passage of said Act, and at the time the defendants took charge of said business and property, and still is, justly (345) indebted to your orator for the same.

VII.

That, within a short time after the appointment and qualification of the defendant and their organization as the State Dispensary Commission, your orator being desirous of having its account against the State Dispensary settled, and in order that all differences might be reconciled, or disputes, if any, adjusted, and the amount due to your orator fixed and determined,

filed with said defendants an itemized statement of its account and requested the defendants to have the same audited so that it could be passed upon; that, thereafter the defendants notified your orator that there was still on hand and undisposed of a portion of the whiskey which your orator had sold to the said State Dispensary, and asked your orator to take back said whiskey and allow a credit therefor, then and there holding out as an inducement to your orator for so doing, that if they were permitted to return said goods, it would greatly facilitate a settlement with your orator and enable them to make a much earlier payment of the account, and your orator being anxious to remove every possible cause of delay in obtaining a settlement of its claim, did take back all of said goods, and give credit therefor at the invoice price thereof.

VIII.

That, on or about the 24th day of May, 1907, the defendants advised your orator that, in comparing its account with the books kept by the State Dispensary, they had discovered a discrepancy between the amount claimed by your orator and the amount shown by said books to be due of $292.14 growing out of certain credits to which the said State Dispensary was entitled, and which your orator had failed to allow, but that, in every other particular, your orators' account was, according to the audit made by the defendants, correct, and corresponded with the said books, and that if your orator would allow said credit there would be no further dispute as to the amount due (346) to your orator, and your orator being still anxious to get its account adjusted and receive payment of the same, did consent that said sum might be deducted, and, thereupon, it was agreed between your orator and the defendants, that there was, on the date above mentioned, a balance of $66,501.19, justly due and owing to your orator by the said State Dispensary, which said sums the defendants then and there agreed to pay, but notwithstanding your orator has made frequent demands on them, they have refused and still refuse to pay the same.

IX.

And your orator further shows that, as it is informed and believes, the defendants have received from the sale of the property of the State Dispensary and the collection of debts due it, and now have in their hands a large sum of money, amounting to upwards of $800,000.00, and that this sum if properly preserved and applied, will be amply sufficient to pay off and discharge the claim of your orator and all other just liabilities of

said State Dispensary, which said liabilities do not, as your orator is informed and believes, exceed the sum of $609,000.00, all of which facts will more fully appear from the report made by the defendants to the Governor of the State of South Carolina, on or about the 4th day of January, 1908, to which report reference is hereby made for the ascertainment of said amounts.

X.

That, as your orator is advised and believes, the money received by the defendants and held by them as hereinbefore alleged, having been placed in their possession for the specific purpose of paying all the just liabilities of the State Dispensary, became and now constitutes a trust fund in the hands of said defendants, and the said defendants hold the same as trustees for your orator and the other creditors of the said State Dispensary, and the amount due your orator having been determined and agreed upon your orator is entitled to have said amount immediately paid to it out of said fund.

XI.

(347) And your orator further shows that said defendants are abusing the trusts reposed in them by wrongfully and unlawfully failing and refusing to carry out the terms and provisions of said Act of 1907 of the General Assembly of the State of South Carolina, and that the greater part of the money which the defendants have received, as aforesaid, has been on deposit for many months, and is now on deposit in certain banks in the State of South Carolina, in which banks the said defendants, or some of them, are respectively interested, either as officers, stockholders or directors; that a large sum of said money is now in the National Loan and Exchange Bank of Columbia, in which bank the defendant Murray, who is the Chairman of the Dispensary Commission is a large stockholder and director; that another large portion of said money is deposited in the Bank of Timmonsville, in which said bank the defendant McSween is a stockholder and a director, and is also its President; that another large portion of said money is on deposit in the Peoples Bank, of Union, in which bank the defendant Arthur is a stockholder and a director and also its President; that another large portion of said money is on deposit in the Bank of Aiken, in which bank the defendant Henderson is a stockholder and director; that another portion of said money is deposited in the Piedmont Savings and Investment Company, of Greenville, in which the defendant Patton is a stockholder and director and a portion of the said money is deposited in the Mer-

chants and Farmers Bank, of Cheraw, in which bank one W. F. Stevenson, who resides in the said town of Cheraw, and who is the attorney for the defendants constituting the State Dispensary Commission is a stockholder and director and also its President.

That the said defendants have wrongfully, unlawfully and fraudulently declined and refused to make distribution of the said money among the creditors of said State Dispensary, or to pay the claim of your orator, or any of the other of said creditors, for the reason, as your orator verily believes and alleges (348) the fact to be, that there has been formed and now exists an unlawful understanding or agreement between the defendants by which it has been decided that the money deposited in the banks above named shall be held and allowed to remain as long as possible in said banks and be used by them for their own benefit and profit.

XII.

And your orator further shows that there are a large number of persons claiming to be creditors of the said State Dispensary and seeking to collect from the defendants various sums ranging in amount from one to many thousand dollars; that some of said persons, for the purpose of compelling the payment of their debts, have already brought suit against said defendants, and others are, as your orator is informed and believes, threatening to institute similar actions; and if the defendants shall be required or permitted to defend a multiplicity of such suits in order to determine the validity of each claim against them, and shall be allowed, as they have declared their intention to do, to defer the payment of all claims until the final termination of said suits, a large part of the funds in their hands will be wasted in expensive litigation and court costs, and a great wrong, injury and injustice will be done to your orator and the other creditors whose claims are admitted to be just and correct, and about which there is and can be no dispute.

XIII.

And your orator further shows that, although the said defendants have in their hands the large sum of money hereinbefore mentioned, and although they are wrongfully and unlawfully retaining said money for the use and benefit of institutions in which they are personally interested, and are wrongfully and unlawfully refusing to carry out and perform the duties and trusts imposed upon them by the General Assembly of the State of South Carolina, the said defendants have only given bonds in

the sum of $10,000.00 each, and they are now, as your orator (349) is informed and believes, threatening to take measures to have an Act passed by the General Assembly of South Carolina terminating their commission and providing for a transfer of the money in their hands to the State Treasurer, which money ought to be applied to the payment of the debts due to your orator and the other creditors of the said State Dispensary, and thus, if possible, place the same beyond the reach, or by some other means, impair the contract rights of your orator and said other creditors, and, as your orator is advised and believes, unless the defendants are restrained and enjoined from exercising any control over or in any way interfering further with said fund, the said defendants will waste or wrongfully divert the same to the great and irreparable damage of your orator and all the other creditors of the State Dispensary.

XIV.

And your orator further shows, upon information and belief, that there is a very wide difference between the opinions of the defendants as to the duties required of them as members of the Dispensary Commission, and the proper manner of performing said duties; that the defendant B. F. Arthur, although still a member of said Commission, has declined and refused to take any further part in the proceedings thereof, and has not, for at least eight months, attended any of the meetings of said Commission, or participated in any of its deliberations; that the other four defendants as members of said Commission are about equally divided as to what course ought to be pursued with reference to the ascertainment of the just liabilities of the State Dispensary and the payment of the same, and that, by reason of such division, the said defendants have become engaged in a dispute among themselves, which renders it almost impossible for them ever to agree upon any plan by which to carry out the provisions of the Act of 1907 of the General Assembly of South Carolina, and to execute the trust imposed upon them by said Act and as your orator is advised and believes, unless this honorable court shall take charge of the trust fund now in the hands of the defendants as members of said Commission and administer the same in accordance with the provisions of the said Act of 1907, your orator and the other creditors of (350) said State Dispensary, will, to their great and irreparable damage, be indefinitely delayed in the collection of their claims.

XV.

And your orator further shows, upon information and belief, that the defendants now allege and pretend that there were

certain irregularities and fraud in connection with some of the sales of liquors made to the former officers of the State Dispensary, and the defendants have entered into an unlawful combination of conspiracy with one J. Fraser Lyon the present Attorney-General of the State of South Carolina, and under whose advice the said defendants are acting, to aid the said Lyon is carrying out his frequent threats to prosecute and imprison said officers, and to that end, have agreed among themselves and with said Lyon to withhold the payment of the claim of your orator and all other creditors, until the said Lyon has obtained such evidence as may be sufficient to prove the guilt and secure the conviction of said officers; and that under and pursuant to this agreement, combination of conspiracy the defendants have refused and are still refusing to carry out the provisions of the Act of 1907 and to pay the claim of your orator and the other just liabilities of said State Dispensary, although the account of your orator has been duly audited, the amount claimed admitted to be justly due and payable, as hereinbefore alleged, and notwithstanding the fact that the defendants have never made any pretense or claim that either of the sales made by your orator was, in any respect, irregular, illegal or fraudulent, and notwithstanding the frequent promises and agreements by the defendants to pay the amount so admitted to be due.

XVI.

And your orator further shows, that, notwithstanding the fact that the amount claimed by your orator has been admitted by the defendants to be a just liability, against the said State Dispensary and now due and payable out of the fund in their hands and although the said defendants have never claimed or pretended that said amount was subject to any offsets, credits (351) or counter-claims, your orator is ready, able and willing, if this honorable court shall direct that the amount due to it be immediately paid, to execute and deliver to the said defendants a good and sufficient bond in such sum as may be required by this honorable court to the full amount of its claim, if necessary, conditioned to pay to the said defendants all such amounts as may be, upon the hearing of this cause, found and adjudged to be due by your orator to these defendants by way of offset, reduction, credit, counter-claim or otherwise.

In consideration whereof, and for as much as your orator is without remedy and can obtain adequate relief only in a Court of Equity, and to the end that the defendants may be prevented from committing further wrongs and trespasses against the rights of your orator, and for the purpose of pre-

serving the funds in the hands of the defendants and of enforcing the rights and equities of your orator in and to the same, and preventing further waste, loss and damage, by reason of the facts alleged in this bill, your orator prays:

(1) That this Honorable Court will either forthwith appoint a receiver to take charge of and administer as a trust fund all the money now in the hands of the defendants arising out of the sale of the property belonging to the State Dispensary of South Carolina or from the collection of debts due it; or direct and decree that the amount admitted to be due to your orator be immediately paid to it upon the execution of your orator of a good and sufficient bond to be approved by the court and conditioned to pay to the defendants all such sum or sums as may be found to be due them by your orator and adjudged to be paid by it.

(2) That the defendants, their agents, servants, attorneys and employees be restrained and enjoined from disposing of or paying out, or in any manner interfering further with said fund or any part thereof, except to transfer the same to the receiver appointed by the court, or to pay the amount due to your orator as the court may direct.

(3) That it be referred to a Master to ascertain and deter-
(352) mine the amount due to your orator for goods sold and delivered by it to the said State Dispensary, and that a decree be entered ordering and directing that the amount so found to be due be immediately paid to your orator. That the defendants be required to set forth an account of all and every sum or sums of money received by them, or which has been received by any person or persons, by their or either of their orders, or for their or for either of their use, from the sale of any property of the said State Dispensary or the collection of any debt or debts due it, and when and from whom, and from what in particular, all, and every such sums were respectively received, and how the same respectively have been applied or disposed of.

And that your orator have such other and further relief in the premises as the nature of the circumstances of this case may require and as to the court may seem meet and proper;

And may it please your Honors to grant unto your orator a writ of injunction, conformable to the prayer of this bill, and also a writ of subpœna directed to the said defendants, commanding them, and each of them, to appear and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and to stand to, perform and

abide by such orders, directions and decrees in the premises as to the court shall seem meet or be required by the principles of equity and good conscience.

(Signed) THE FLEISCHMANN CO.,
By CASPER H. ROWE.

MERRICK and BARNARD,
GEO. B. LESTER,
Solicitor for Complainant.

STATE OF NORTH CAROLINA,
County of Buncombe,

On this the 20th day of January, 1908, before me personally appeared Casper H. Rowe, who being first duly sworn, says: That he is an officer of the complainant corporation, The Fleischmann Company, to-wit, its treasurer, and makes this affidavit in (353) its behalf; and that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true.

(Signed) CASPER H. ROWE.

Sworn to and subscribed before me this the 20th day of January, 1908.

(Signed) PHILIP R. MOALE,
Notary Public.
My commission expires September 11th, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleishmann Company, Complainant,
vs.
W. J. Murray and others, Defendants.

Upon considering the bill of complaint filed in this cause, it is now, on motion of the solicitors for the *complaint*, ordered and adjudged that the defendants be and appear before the undersigned judge, at his Chambers, in Asheville, North Carolina, at 10 o'clock a. m. on the 29th day of January, 1908, and show cause, if any they have, why the relief prayed for in said bill shall not be granted, and why a receiver shall not be appoint-

ed by this court to take charge of and administer all of the funds now in the hands of the said defendants, arising from the sale of property belonging to the State Dispensary, or from the collection from any debts due to it.

Let a copy of this order, together with a copy of the bill, be served forthwith upon each of the defendants.

This the 21st day of January, 1908.

(Signed) J. C. PRITCHARD,
United States Circuit Judge.

A true copy—Attest:

C. J. MURPHY,
[Seal] C. C. C. U. S., Dist. S. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

The Fleishmann Company, Complainant,
vs.
W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.
} In Equity.

Affidavit of George B. Lester.

George B. Lester, being first duly sworn, says:

That he is general counsel for the complainant above named, and also a member of a special committee appointed by certain creditors of the South Carolina State Dispensary, for the purpose of obtaining an adjustment and settlement of their claims against the defendants; that as such general counsel for the complainant and member of said Committee, affiant has spent much time in the City of Columbia, where the defendants constituting the Dispensary Commission, hold their sessions that during affiants' visits to Columbia, he has had frequent conversations with numerous persons, business men and citizens of Columbia, who are familiar with the affairs of the State Dispensary and well acquainted with the defendants, or some of them, that in a large number of these conversations

affiant was informed, and it was the prevailing opinion among those acquainted with Dispensary matters, that the next session of the General Assembly of the State of South Carolina would take some steps or would pass some Act looking to an abolition of the Dispensary Commission and the disposition of the funds in the hands of the defendants. Affiant was also informed by one of the officials connected with the defendants constituting (356) the State Dispensary Commission that legislation would be asked for in the form of a bill providing for the abolition of the Dispensary Commission and the establishment of a Court of Claims to pass upon and determine the amounts due to the various creditors of the State Dispensary and for a transfer of the funds now in the hands of the Commission to the State Treasurer.

Affiant further states that the General Assembly of the State of South Carolina is now in session, and that, from information which has come to affiants' knowledge since the filing of the bill and the issuing of the order to show cause in this suit, he has reason to believe and does verily believe, that some attempt will be made to have the said General Assembly pass some bill, the object of which is to remove the funds now in the hands of the defendants beyond the jurisdiction of this court, and that, on January 21st, 1908, there appeared an article in "The State," a newspaper of wide circulation and influence in the City of Columbia, in which article it was suggested that such action could be easily taken; that the defendants and their counsel are contending that the money now in the hands of the defendants constituting the Dispensary Commission is a State fund, and, as such, the present General Assembly has entire control over the same, and that any suit brought by any creditor of the State Dispensary seeking to enforce any claim against said fund is a suit against the State; and affiant verily believes and alleges the fact to be, that it is the object and purpose of the defendants to avoid, if possible, the payment of the claim of the complainant, and all other creditors, and that, in view of the application which has been made to the court for the appointment of a receiver to take charge of said fund, it is the purpose of the said defendants, or their attorneys or representatives, to thwart the action of the plaintiff by taking some immediate steps to put this money beyond the reach of this court and thus deprive the complainant of any relief in this suit.

Affiant further states, on information and belief, that in addition to the amounts deposited in the banks mentioned in complainants' bill of complaint, to-wit, the National Loan and (357) Exchange Bank of Columbia, The Bank of Timmonsville, The Peoples' Bank of Union, The Bank of Aiken, The Piedmont Savings and Investment Company of Greenville, The

Merchants and Farmers Bank of Cheraw, some portion of said funds is held by the Palmetto National Bank of Columbia, The Columbia Savings Bank and Trust Company and The Bank of Camden.

And affiant further shows that, under the former order to show cause entered in this case, complainant has no protection against a dissipation or diversion of the funds in the hands of the defendants, or in the depositaries above named, other than a writ of injunction heretofore granted by this court in the case of Wilson Distilling Company against said defendants, in which case the complainant in this case has no interest or right to be heard, and if the said injunction should be, either by consent of parties, or otherwise, dissolved, said defendants, as affiant verily believes, would at once take steps to place the funds under their control beyond the reach of this court, either by securing an Act of the Legislature, as above suggested, or by some other means, and, as affiant is advised and believes, for the reasons set forth in this affidavit and the complainants' bill the complainant is entitled to and ought to be allowed an order restraining said defendants and the depositaries in which said defendants have place the funds under their control, from in any way paying out any of said funds, removing same beyond the jurisdiction of this court, or taking any action tending to or which might prevent the complainant from obtaining the full relief to which it is entitled in this cause.

Wherefore, affiant prays that the depositaaries above named be made parties to this cause, and the order heretofore made, be so amended as to restrain and enjoin said defendants and said depositaries from interfering with, paying out, transferring or in any wise changing the present status of said funds, until the further orders of this court.

(Signed) GEO. B. LESTER.

Sworn to and subscribed before me this 22d January, 1908.

(Signed) W. SCOTT RADEKER,
Notary Public.
My commission expires November 14, 1909.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

(358)

The Fleischmann Company, Complainant, *vs.* W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

RESTRAINING ORDER.

It having been made to appear to the court, since the signing of the order to show cause, heretofore granted in this case, that there is reasonable ground to apprehend that the defendants may, before the return day of said order, make some attempt to place the funds now in their hands, and for which a receiver has been asked, beyond the jurisdiction of this court, and that it is necessary, in order to secure the complainants' rights, that said funds shall remain *in statu quo*;.

It is now, on motion of solicitors for the complainant, ordered and adjudged that the defendants and each of them, their agents, servants, attorneys and employees, and the following named depositaries, to-wit: The National Loan and Exchange Bank, The Palmetto National Bank, The Columbia Savings and Trust Company, all of Columbia, South Carolina; The Bank of Timmonsville, of Timmonsville, South Carolina; The Peoples Bank of Union, South Carolina; The Bank of Aiken, South Carolina; The Piedmont Savings and Investment Company of Greenville, South Carolina, The Merchants and Farmers Bank of Cheraw, South Carolina, and the Bank of Camden, South Carolina, which depositaries are hereby made parties defendant to this cause, and all other banks or depositaries, (359) if any, in which said funds, or any part thereof, is now deposited, their officers, agents, servants, attorneys, and employees, be, and they are each hereby restrained and enjoined from interfering with, paying out or transferring to any person or persons whomsoever, or in any way disturbing or changing the present status of said funds, or any part thereof, and from taking any steps with reference to the said funds tend-

ing to, or which may put said funds beyond the jurisdiction of this court until the further orders of this court.

This January 22d, 1908.

(Signed) J. C. PRITCHARD,
U. S. Circuit Judge.

A true copy—Attest:
[Seal] C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

His decision is reported in the newspaper as follows:

"That, as the State of South Carolina has seen fit to engage in the purchase and sale of spirituous liquors, it can not be reasonably contended that in so doing it is performing the functions usually exercised by a State when necessary to preserve its autonomy and maintain its sovereignty.

"The Supreme Court of that State has decided that the Act authorizing the establishment of a Dispensary was constitutional, However, it can hardly be assumed that it was contemplated at the time of the adoption of the 11th amendment that a sovereign State would engage in the purchase and sale of spirituous liquors for profit.

"The State having seen fit to engage in this business, and at the same time to deprive its citizens of the right to engage in such business in competition with the State, thereby placed itself in a position where it could not, with consistency, avail itself of the immunity conferred by the 11th amendment in a suit like the one at bar, in which it is sought to collect a debt contracted by the individuals placed in control of such business with implied if not direct authority to contract such debts. Having deprived its citizens of a right to engage in this partic-
(360) ular line of business, reserving the right to monopolize the business through its agents appointed for that purpose, it would be manifestly unjust to permit the State, under any circumstances whatsoever, to avoid the payment of debts contracted by the purchase of goods from the sale of which it has derived enormous profits."

The Dispensary matter was brought up in court to-day on an order of Judge Pritchard signed on motion of the Wilson Distilling Company and other creditors, citing the Dispensary Commission to appear and show cause why a receiver should not be appointed for the $800,000 fund now held by them. Before the hearing in this case Judge Pritchard informally announced his decision in the matter of the jurisdiction of the

court in the Fleischmann case, which was also a suit asking for a receiver for the Dispensary fund.

The court maintained that the defendants, the Dispensary Commissioners, were not officers of a court in the strict sense; that they were merely officers to perform a certain specific duty. He said that the sum of $800,000 was placed in the hands of the Dispensary Commissioners to settle all just liabilities of the Dispensary and that it was clearly a trust fund.

The judge declared that the suit is not a suit against the State and added: "I have carefully considered this whole matter, and had I any doubt I would give the defendants the benefit of that doubt and rule in favor of the State. There is no doubt in my mind, however, and, therefore, the court takes jurisdiction."

THE STATE OF SOUTH CAROLINA,

(361)

In the Supreme Court.

Original Jurisdiction.

The State of South Carolina ex rel. J. Fraser Lyon, Attorney-General, Petitioner,

vs.

W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, Respondents.

TRAVERSE TO RETURN.

The petitioner herein replies to and traverses the answer and return of W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, as State Dispensary Commission, respondents, as follows:

1.

As to the objection raised by the respondents that they are, as the State Dispensary Commission, restrained and enjoined from paying out, or an any wise interfering with the funds in their hands, arising from the assets and property of the late State Dispensary, by injunction of his Honor, J. C. Pritchard, Judge of the Circuit Court of the United States, petitioner joins issue with the respondents and alleges that the petition in the case of Wilson Distilling Company et al. *vs.* State Dispensary Commission, and the petition in the case of the Fleischmann Company *vs.* State Dispensary Commission,

together with the exhibits and orders therewith, show that the said proceedings are suits against the State of South Carolina, and that the Circuit Court of the United States is utterly without jurisdiction to, in any manner, entertain the same, or to interfere with, or to, in any wise, restrain the action of the said Commission.

2.

Further, by way of traverse and reply, petitioner says that the property and assets in the hands of the State Dispensary Commission, arising from the assets and property of the late (362) State Dispensary, are the sole property of the State of South Carolina, and the affairs of the late State Dispensary are now being concluded and wound up under the terms of an Act of the General Assembly of the State of South Carolina approved the 16th day of February, 1907, and amended by an Act approved the 24th day of February, 1908; that the Commission in dealing with said funds cannot be controlled, nor can the disbursement or use of said funds be directed by any court in equity or otherwise, in any suit in which *in with* the State of South Carolina is not a party, as the interests of the State would be necessarily affected directly by any decree or judgment rendered in such suit.

J. FRASER LYON,
Attorney-General, Petitioner.

Decision of Supreme Court of South Carolina on Petition for Mandamus.

(363) Filed March 27th, 1908.

THE STATE OF SOUTH CAROLINA, IN THE SUPREME COURT,
NOVEMBER TERM, 1907. FIFTH CIRCUIT,
RICHLAND COUNTY.

The State of South Carolina ex rel. J. Fraser Lyon, Attorney-General, Petitioner,
against
W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, as State Dispensary Commission, Respondents.

OPINION BY C. A. WOODS, A. J.

The General Assembly by an act approved 24th February, 1908, appropriated the sum of $15,000 to be paid by the

State Dispensary Commission out of any funds in its hands into the State Treasury for the use of the Attorney-General in the conduct of criminal prosecutions, against persons charged with violations of laws connected in any manner with the State Dispensary. For the enforcement of his official rights, Hon. J. Fraser Lyon, Attorney-General, filed his petition for mandamus on 2nd March, 1908, in this court against W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, as the State Dispensary Commission. The petition alleges the custody by the Commission of State funds sufficient to make the payment of the sum appropriated, the demand for payment by the State Treasurer, and the refusal by the Commission to comply with his demand. The petition further alleges the payment by the Commission of the sum appropriated to be a plain ministerial duty required by statute, and its prayer is for a writ of mandamus requiring the performance of this duty. Upon this petition, the Chief Justice made an order requiring the respondents, as the State Dispensary Commission, to show cause in this court on 4th March, 1908, why the mandamus should not issue as prayed for.

The State Dispensary Commission in its return and answer (364) admits the statute above recited requires of them the payment of the sum therein mentioned to the State Treasurer, and their custody of funds sufficient to meet the requirement, and the refusal to make the payment. As justification of its refusal to comply with the statute, the Commission alleges: "That they are restrained and enjoined by orders of the United States Circuit Court for this Circuit from paying any funds into the hands of the State Treasurer, in two cases, to-wit: The case of the Wilson Distilling Company *vs.* W. J. Murray and others, a copy of their bill of complaint being hereto attached and marked "Exhibit A" along with the restraining order in said case, and an amended bill that has just been filed. And further, that they are restrained by an order in the case of the Fleischmann Company *vs.* W. J. Murray and others, a copy of which bill and restraining order and oral decision as announced is hereto attached and marked "Exhibit B."

The answer sets out that these orders of injunction were made by the Circuit Court of the United States, notwithstanding respondents plea on the following grounds to the jurisdiction of the court: "1. The funds in the hands of the State Dispensary Commission created by the Act of February 16, 1907, (Acts of 1907, p. 385,) belong to and are the property of the State, which has the right to control the same, and, which, through the said Commission as its agent, is in possession thereof. "2. The said 'State Dispensary Commission' is the mere agent or instrumentality of the State vested with the minister-

ial function of winding up the State Dispensary business, selling the goods and property on hand, collecting the debts due the State in connection with said business, and holding the proceeds for the State and subject to its rights of disposition thereof, and also vested with the ministerial function of paying the funds held by them for said State such of the said claims as they may upon said investigation find and decide to be just liabilities of the State. "3. The pending action is in effect an action against the State, because it seeks to lay hold of the funds belonging to the State and in the hands of said Commis-
(365) sion as its agent and through the said Commission in the possession of the State, and further seeks to have such funds applied to the payment of alleged liabilities of the State.

4. The State cannot be held to have waived its constitutional immunity from suit by the said act creating the State Dispensary Commission except to the extent of the remedies therein provided for and allowed to claimants for the collections of such debts as may be due them by the State in connection with its Dispensary business, and therefore, such claimants are limited to the remedy therein provided for and allowed.

5. The said Act creating the "State Dispensary Commission" having been passed and the remedies therein provided for having been allowed as a purely voluntary matter on the part of the legislature of the State, the said act is subject to be repealed and the allowance of the remedies therein provided for is a subject to be recalled at any time at the pleasure of the Legislature and in its discretion."

The pleadings in the causes in the Federal Court will not be set out in detail. It is sufficient to say the actions were brought by the plaintiffs therein named, claiming to be creditors for liquor sold to the State Dispensary against the respondents constituting the State Dispensary Commission; and in those actions the Circuit Court of the United States has made orders enjoining the respondents from disposing of, except by order of that court, the fund of $800,000, which came into their possession as the Commission appointed and organized under the Statutes of the State to wind up the State Dispensary, and contemplating the adjudication by that court of the claim of the plaintiffs and others and the complete control of the entire fund for the satisfaction of such claims as the court might adjudge to be just.

Replying to the return of the Commission made in this cause, the Attorney-General alleges, first: "That the petition

in the case of Wilson Distilling Company et al. vs. State Dis-
(366) pensary Commission and the petition in the case of the Fleischmann Company *vs.* State Dispensary Commission, together with the exhibits and orders therewith, show that the said proceedings are suits against the State of South Carolina, and that the Circuit Court of the United States is utterly without jurisdiction to, in any manner, entertain the same, or to interfere with, or to, in anywise, restrain the action of the said Commission; "and second" that the property and assets in the hands of the State Dispensary Commission arising from the assets and property of the late State Dispensary, are the sole property of the State of South Carolina, and the affairs of the late State Dispensary are now being concluded and wound up under the terms of an Act of the General Assembly of the State of South Carolina approved the 16th day of February, 1907, and amended by an act approved the 24th day of February, 1908; that the Commission in dealing with said funds cannot be controlled, nor can the disbursement or use of said funds be directed by any court in equity or otherwise, in any suit in which the State of South Carolina is not a party, as the interests of the State would be necessarily affected directly by any decree or judgment rendered in such suit."

From this statement of the pleadings, it is evident no issue of fact arises. It is equally evident that if the Circuit Court of the United States had jurisdiction to enjoin the respondents as the State Dispensary Commission, their answer is a complete defence to the petition for mandamus, for no court would entertain for a moment an application to require parties to do that which they had been required and enjoined not to do by judicial authority. But a judgment by a court without jurisdiction of the parties and subject matter is a nullity and must be so treated by other courts whenever and for whatever purpose it is presented and relied on. Elliott *vs.* Piersol, 1 Pet., 328, 7 L. Ed., 164; Hickey's Lessee *vs.* Stewart, 44 U. S., 730, 11 Ed., 814; *Ex parte* Bradley, 74 U. S., 364, 19 L. Ed., 214; Fischer *vs.* Harnden, 9 Fed. Cas., No. 4819; Gray *vs.* Larrimore, 10 Fed. Cas., No. 5721; Devall *vs.* Taylor, Cheves, 5;
(367) McCall *vs.* Cohen, 13 S. C., 198; State *vs.* Penny, 19 S. C., 218; Canady *vs.* Black, 34 S. C., 194; Stanley *vs.* Stanley, 35 S. C., 94; Paul *vs.* Railway Co., 50 S. C., 23; Beaudrot *vs.* Murphy, 53 S. C., 118.

This principle applies as well to an order of injunction made by a court without jurisdiction, interposed against an application for mandamus, as to any other order or judgment. Ellingsworth *vs.* Carlson, (Neb.), 101 N. W., 1004; State *vs.* Miller (Ohio), 39 N. E., 24; State *vs.* Graves (Neb.), 92 N. W., 144. The exception is that a decree of the Supreme Court

of the United States is binding on all the courts of the land, and the decisions of the appellate courts of each State and of the United States are binding upon the courts subordinate to them.

The consideration of the question whether that which purports to be the judgment of another court is void for lack of jurisdiction, is always to be entered on with deference by the court before which the question is made; and the opinion of a court of exalted dignity and acknowledged ability in favor of its own jurisdiction, like its opinion on other subjects, should have a strong persuasive influence in favor of the conclusion it has reached. There is no reason for anxiety or asperity on account of differences between courts of the United States and the State courts. These differences must sometimes arise under our dual system of government, but they are consistent with cordial amity between the courts and may be readily and finally settled by the Supreme Court of the United States, without hardship to the parties interested, and without sacrifice of their rights.

With the greatest respect for the learned judge who has made the orders of injunction relied on by the respondents in *the* this controversy, and after careful consideration of the opinion filed in support of those orders, this court has reached the conclusion that the Circuit Court of the United States has undertaken to assume jurisdiction of a matter in which the political rights and property interests of the State of South Carolina are vitally involved, without the consent of the State. By (368) those orders not only has that court essayed to take charge and administer the property of the State without its consent, but it has also undertaken to assume control of and wind up a distinct department of the government of a sovereign state, in disregard of the plan which the State itself had adopted and decreed by the solemn enactment of its General Assembly. If these conclusions can be sustained by a consideration of the Constitution and statutes of the State, then it will be conceded the proceedings in the Federal Court were attempts to sue the State of South Carolina without its consent, and the matters which that tribunal has undertaken to adjudge were beyond the jurisdiction of any court; and therefore its orders of injunction must be regarded as nullities affording no legal protection to the respondents.

The principle that one of the States of the United States cannot without its consent be sued in any court by a private citizen was thus expressed and crystallized in the 11 amendment of the Constitution of the United States: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

the United States by citizens of another State, or by citizens or subjects of any foreign state." It is now generally held that exemption from such a suit is an incident of sovereignty not dependent on the constitutional provision. Kawansnakoa *vs.* Polyblank, 205 U. S., 347, 51 L. Ed., 834.

The claims of the alleged creditors, whose rights the Federal Court undertakes to adjudicate, are for alleged debts contracted in the operation of *in* the State Dispensary; and the funds out of which that court is attempting to satisfy them were derived from the assets of the State Dispensary. Therefore, in determining whether the suits in the Federal Court are for the adjudication of the State's liabilities and the disposition of the State's property, and so not cognizable by any court, it is essential to ascertain and state the relation the State Dispensary bore to the State of South Carolina.

(369) In the year of 1892, this State by Act of General Assembly, entered upon an interesting experiment in the management of the liquor traffic by taking entire charge of the business, and making it a State monoply. State officers were designated to manage the enterprise and the funds necessary for its conduct were drawn from the State Treasury. The Board of Control, consisting of the Governor, the Comptroller General, and the Attorney General was clothed with the power to make rules and regulations for its management. Subject to these rules, the purchase of liquors, and the distribution of them to the subordinate Dispensaries was intrusted to an officer called a Commissioner. The business was made by the Statute as essentially a part of the government as the management of its taxes or its public schools, and all the assets became as much the property of the State as its asylum and other public institutions, or the funds in the vaults of the Treasury. The act was vigorously attacked in the courts as unconstitutional on the ground that the conduct of such a business was not within the police power of the State and was entirely without the sphere of governmental function. The constitutionality of the act, in so far as it provided for the State to own all the liquor brought into the State for sale and to monopolize the sale of liquor within the State, was finally established by the judgment of this court in State *vs.* Aiken, 42 S. C., 222, and subsequently by the judgment of the Supreme Court of the United States in Vandercook *vs.* Vance, 170 U. S., 443.

Subsequently, the following provision was incorporated into the Constitution of 1895: "The General Assembly may license persons or corporations to manufacture and sell retail alcoholic liquors or beverages within the State under such rules and restrictions as it deem proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic

liquors and beverages within the State, and may authorize and empower State, County, and municipal officers, all or either, *under the authority and in the name of the State*, to buy in any (370) market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations as it deems expedient." Under this provision of the Constitution, a new Dispensary statute was enacted (22 Stat., 123,) changing in some particulars the details of the original Dispensary law, but retaining in the entirety the scheme of State ownership and control. The State Dispensary and all its assets acquired under this statute are to be regarded the property of the State, and the debts contracted in its lawful management are to be regarded the debts of the State, not only by virtue of the judgment of highest courts of the land, but also by virtue of the express declarations of the Constitution of the State. With these lights before it, this court held in State *vs.* Farnum, 73 S. C., 165, that the State Dispensary was as much a part of the State government and as subject to as full legislative investigation and control as the State Treasury.

It is nothing to the purpose to say the liquor trade should not have made an integral part of the State government. The fact is it was so made. Whether as such part of the State government it was a success or a disastrous failure is a question for political discussion apart from this controversy as to its legal status.

In the next place, it is to be observed the statutes nowhere give any legal remedy whatever to those who sold liquor to the directors of the State Dispensary and thereby became creditors of the State. Such creditors were dependent entirely upon the good faith of the State to discharge its obligations.

This brings us to the pivotal question: Has the State in closing out this department of the government in the form in which it formerly existed conferred by statute upon creditors the right to sue for the establishment and collection of these debts due from the State, and by statute set apart the public funds derived from the disposition of its Dispensary assets to be subject to seizure and final disposition under judicial order. (371) It seems hardly necessary to say there is no legal requirement that the State shall manage its financial affairs or any branch of them through one general fiscal agent called its Treasurer, or that its funds or any portion of them should be kept in one office called its Treasury. The State Treasurer is a constitutional officer but his duties and powers depend entirely upon the will of the General Assembly of the State. Presumably the State funds are in his hands, but the General Assembly may require the public funds or any part of them to be put in any place or with any person it seems fit; and there is

no limit to its discretion in imposing conditions and conferring discretion on its fiscal agents as to the disbursements of these funds to its creditors. When the discretion is conferred by the State, no court can supplant the agent of the State and substitute for his discretion its own judgment. In the case of Buchanan *vs.* Alexander, 4 Howard, 20, certain boarding-house keepers attempted to attach wages due to seamen from funds in the hands of the purser of the United States frigate "Constitution." The court said: "The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem cannot, in this respect, be distinguished from any other disbursing agent of the Government. If the creditors of these seamen, by process of attachment, divert the public money from its legitimate and appropriate object, the same things may be done as regards the pay of our officers and men of the army and navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from (372) the Treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot in any legal sense be considered a part of his effects. The purser is not the debtor of the seamen. The same principal was involved and decided in Oregon *vs.* Hitchcock, 202 U. S., 50 L. Ed., 934; Naganab *vs.* Hitchcock, 202 U. S., 473, 50 L. Ed., 1113; Lowry vs. Thompson, 25 S. C., 424; Hopkins *vs.* Clemson College, 77 S. C., 12.

By the Statute of 16th February, 1907, (25 Stat., 1), the State Dispensary was abolished and the County Dispensary system for the sale of liquor under State authority was established in its stead. On the same day an act was passed entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs." The act provides for the appointment by the Governor of a Commission composed of five members. The powers and duties of this Commission stated in short form were: To close out the entire business and property of the State Dispensary except the real estate, by selling the assets, collecting debts due and paying from the sales and collections all just liabilities at the ear-

liest date practicable; to sell the liquors on hand to the County Dispensaries if it saw proper but to no other person in the State; to return liquors illegally bought and to determine the legality of "said purchases" by investigating fully the circumstances surrounding all contracts for liquor;" to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony either within or without the State; "to pay to the State Treasurer after deducting expenses" all surplus funds after paying all liabilities;" to "submit to the Governor at the earliest day practicable a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a re-
(373) port in full of their actions and doing." By the last section of the act, it was provided: "That the said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D., 1906, be, and hereby, is, conferred upon the Commission provided for under this Act *Provided*, That for the purpose of investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively to exercise the power and authority herein conferred upon the whole Commission."

The last section is of prime importance because the act conferred upon the Commission the same authority as was conferred on the investigating committee acting under the statute of 24th January, 1906; and by that statute was conferred on the Committee this power: "The Committee be, and they are hereby, authorized and directed to order the Commissioner of the State Dispensary to withhold the payment of any claims against the State Dispensary or any officer thereof, or the claims of any creditor against the said State Dispensary or any of its officers, which they may deem*ed* advisable, until same is duly proved by the production of the books of original entry, and all documents and correspondence relating to all their transactions with the State Dispensary, and to require the person or persons in custody or possession of said books, documents, papers and correspondence to produce the same before the said Committee in person, and when such proof has been submitted to and approved by said Committee, and the State

Treasurer is hereby forbidden to pay such claims upon written notice from the Chairman of said Committee." Comparing this statute with the previous Dispensary legislation, it is perfectly obvious this Commission had conferred on it a discretion in the ascertainment and payment of claims against the State (374) from funds in their hands for liquor sold and accounts collected in winding up the State Dispensary at least equal to that which had been conferred on the Directors of the State Dispensary when the State's liquor business was in operation. The previous Dispensary statutes clearly contemplated that the Directors should buy liquor and pay just claims for its price from the proceeds of its sale. Yet we venture to think no court would have entertained for a moment a suit by creditors looking to judicial interference with the discretion of those directors in determining the just debts of the State for purchases of liquor, and to the judicial administration by injunction or receivership of the funds in their hands.

There is not the slightest suggestion in this statute of consent to the submission or the justness of the claims against the State to the adjudication of any court, or to the transference of these public funds to a court for administration. On the contrary, the only method provided in the statute for the separation of the just from the unjust claims was the investigation into them by the Commission itself. The language of the statute plainly contemplated the appointment of a Commission of discreet business men for the purpose of representing to the fullest extent the State, as its officers in closing out its liquor business, in taking charge of its funds, in investigating the conduct of the business with a view of ascertaining and deciding for the State what were just claims and paying them from the funds realized from the business. The extent of the investigation and the degree of proof required were left to the discretion of the Commission. That this was the scope and meaning of the statute is made still more manifest when it is considered that charges of outrageous fraud, not only against the State's officers having charge of its liquor business, but also against those who had sold liquor to the State and were making claims against it, were receiving most anxious consideration by the General Assembly.

(375) The statutes and resolutions passed by the General Assembly which immediately preceded the act providing for the appointment of this Commission show the persistent purpose and well defined public policy to use to the utmost the sovereign power of the State in the investigation of these charges and in separating just from fraudulent claims. The presumption is exceedingly strong against a legislative intention to suddenly abandon this purpose and policy, and strip the State of

its sovereign right to decide for itself what in justice and good faith it was called on to do in respect to the claims against it.

The Statute seems plain in itself, but when viewed in the light of these conditions, we do not see how a doubt can remain that it is to be construed as providing a method of safe-guarding the rights of the State, uncovering frauds against it and providing for the ascertainment, determination and payment of the true debt of the State in the premises, by the Commission who were invested with full responsibility and discretion to the accomplishment of these ends, subject to no interference except that of the General Assembly itself. With this discretion lodged in the Commission, it became the representative of the State with respect to the matter in its charge and a suit brought against it for any purpose was, in effect, a suit against the State. This principle is thus stated in Board of Liquidation *vs.* McComb, 92 U. S., 531, 23 L. Ed., 623: "The objections to proceeding against State Officers by mandamus or injunction are: first, that it is in effect proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal, may have a man-
(376) damus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." After quoting this language with approval in Cunningham *vs.* Macon, etc., R. R. Co., 109 U. S., 446, 27 L. Ed., 995, Justice Miller says: "It is believed that this is as far as this court has gone in granting relief in this class of cases." *Ex parte* Ayers, 123 U. S., 443, 31 L. Ed., 216; Wilson *vs.* Exposition Commission (Iowa), 110 N. W., 1045; Davis *vs.* Mortensen (Neb.), 95 N. W., 831; Cope *vs.* Hastings (Penn.), 38 A., 717; Chemical Co. *vs.* State Board of Agriculture (N. C.), 15 S. E., 1032.

While in Penoyer *vs.* McConnaughy, 140 U. S., 1, 35 L. Ed., 363, it was held the court had jurisdiction to enjoin State officers from sacrificing private rights under an unconstitutional act of a State legislature, yet the court recognized the rule laid down in Board of Liquidation *vs.* McComb, *supra,* that a court has no jurisdiction to entertain a suit to override the discretion vested in State officers by a valid statute.

The Supreme Court of the United States has laid down in a number of cases these propositions, in substance, namely, that a suit may be maintained, (1) to protect private rights by requiring State officers to perform a plain ministerial duty imposed by law; (2) to protect private rights against the wrongs of State officers undertaking to act under statutes void because unconstitutional; and (3) to protect private rights against wrong which State officers may inflict in going beyond the duty imposed on them, or right granted to them by valid State legislation. In all of these cases, the view taken by the court is that the officer cannot claim the protection of State authority, because his violation of private right is due either to his action without any authority of State law, or to his refusal to obey and recognize the State law, and, therefore, in such cases, the State is not behind him. The authorities on this subject are collated in Reagan *vs.* Farmers L. & T. Co., (377) 154 U. S., 363, 38 L. Ed., 1020, in Tyndal *vs.* Wesley, 167 U. S., 204, 42 L. Ed., 137, and other cases.

Under these cases if the State by Statute places a definite sum of money or property in the hands of an officer with the discretion to pay or deliver it to particular persons upon their doing a particular thing, lodging no discretion in the officer, the officer is a naked trustee of the money or other property, and upon the designated persons doing the particular thing required by statute, the duty of the officer to pay over the money or deliver the property is purely ministerial. In failing to discharge the trust by payment or delivery, he does not represent the State, and can claim no protection through it. On the contrary, in such failure he acts in defiance of the State authority, and compliance with the State's mandate may always be enforced by judicial process. Such cases were McKee *vs.* Lamar, 159 U. S., 313, 40 L. Ed., 165, and Rolston *vs.* Crittenden, 120 U. S., 390, 30 L. Ed., 721.

The latter case is mainly relied on to support the jurisdiction of the Federal Court in this matter, but it is entirely different. A statute of Missouri required certain State officers therein named to assign certain liens on Hannibal & St. J. R. R. Company, to certain trustees upon their payment into the State Treasury of a sum of money equal in amount "to all indebtedness due or owing by said company to the State, and all liabilities incurred by the State by reason of having issued on bonds and loan the same to said company as a loan of the credit of the State, together with all interest that has and may at the time when such payment shall be made have accrued and remain unpaid by said company, and such shall have been certified to the Governor of the State by the Treasurer," In making and receiving payment, the trustees and the State offi-

cers differed as to the amount of interest which the statute required to be paid. The dispute was not as to what the officers had the discretion to receive in satisfaction of the obligation to the State, for they had no discretion but as to what under the true construction of the Statute they were required to receive as a pure ministerial duty. On this ground, as will clearly ap- (378) pear from the report of the case, the court entertained a suit to enjoin the enforcement by the officers of what they alleged to be an unpaid debt of the State, which the trustees alleged had been paid as required by statute. The jurisdiction rested on the ground that the State officers could not protect themselves behind the State from being required to perform a ministerial duty which the State by its statute had required of them and which they had refused to perform in opposition to the State's command. Chief Justice Waite thus tersely states the ground of the decision: "It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the eleventh amendment of the Constitution of the United States, and Louisiana *vs.* Jumel, 107 U. S., 711 (27, 448), is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a State officer to do what a statute requires of him. The litigation is with the officer, not the State. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the Trustees are entitled to their decree."

The present case falls clearly within the principle laid down in Louisiana *vs.* Jumel, 107 U. S., 711; 27 L. Ed., 448, and other authorities above cited and is not embraced in the distinction made in the Rolston case. Neither in the latter case nor in any other is the principle questioned that where discretion is conferred on the officer to act for the State in the ascertainment of its debt or in any other matter within its sphere of action, he is responsible to the State alone and a suit against him with respect to such discretion is a suit against the State. (379) We are not careful to inquire whether the discretion lodged in the Commission is the discretion of judicial or executive officers, for the Supreme Court of the United States rests its conclusion that no court can disturb the discretion with which the State has invested its officers or agents upon no such distinction. But, if the distinction be essential, it has been held in numerous cases in this State from Richland *vs.* Miller, 16

S. C., 236, to Lockwood *vs.* Adams, 63 S. C., 191, that the County Board of Commissioners, a Board whose Statutory duty is to investigate and approve claims against the county, in performing this duty, exercises a judicial function. This Dispensary Commission, though having only a temporary existance, is charged by statute with precisely the same duty with respect to claims against the State on account of the Dispensary, and by parity of reasoning their discretion is a judicial discretion and their action with respect to the validity of the claim, judicial action; and we so hold.

The State has a right to lay down any condition, however hard or arbitrary, it may choose with which its creditors must comply as a condition of payment of their demands. No court has a right to abate one jot or tittle of such conditions. There is no ground to say that the creditor shall abide the finding of any person designated by the State to act for it in ascertaining the validity of his claim is an execution to this principle.

Not only was discretion imposed on the Commission in ascertaining the fraudulent and *bona fide* claims against the State, but the State itself has a very large interest in the eight hundred thousand dollars in its hands. The doctrine recognized and applied by the Supreme Court of the United States, and all courts is thus stated by Justice Lamar in Penoyer *vs.* McConnaughy, *surpra*; "The court will look behind and through the nominal parties to the record to ascertain who are the real parties to the suit." In re Ayers, 123 U. S., 443, 31 L. Ed., 216; New Hampshire *vs.* Louisiana, 108 U. S., 76, 27 L. Ed., 656. In this case it is not necessary to look behind the record for the record in the Federal Court and this Court shows beyond dispute the State's interest to be vitally involved in the suits (380) brought in the Federal Court. That interest is not only its obligation as a government to protect itself against fraudulent claims, but the surplus over just debts is to be paid by the Commission into the Treasury of the State for the use of the State. That the State is a necessary party to any suit affecting the funds is self-evident, for surely it is entitled to be heard in the adjudication of what are fraudulent claims against it, and how much surplus is to remain for its use. It is no answer to say the State will not be bound by the proceedings and judgment in the Federal Court, for this court is undertaking to control and dispose of the public funds in the hands of the State officers, and when the funds leave the hands of the State officers and are disposed of under the order of the court, there will be nothing to which any right of the State can attach.

Lastly let it be assumed for the moment, contrary to our conclusion, that the State by the statute of 24th February, 1907,

creating the Commission, did consent that those who held claims against it on account of the Dispensary should have their claims adjudicated by the courts and the State Dispensary assets administered by the courts and applied to the claims so adjudicated. This would not alter the result, for it is obvious that if any such consent was ever given, it was withdrawn by the amendment of 24th February, 1908, wherein it is provided: "That said Commission is hereby declared to possess full powers to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary. And to pay for the State and all just claims which have been submitted to and determined by it, and no other, out of the assets of the Dispensary, which have or may hereafter be collected by said Dispensary Commission: Provided, That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court, as in cases at law: Provided further, that notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the prac-
(381) tice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court. That no funds arising from the sale of the assets of the former State Dispensary, or from the collection of debts due the Dispensary, or moneys delivered by the State Treasurer to said Commission shall be paid out for any purpose or to any person whatsoever except upon the check of the Chairman of said Commission, countersigned by the Treasurer of the State of South Carolina. And the Treasurer of the State of South Carolina shall countersign such checks as may be presented by the Chairman of said Commission only upon presentation of the same, together with a certificate of said Commission or a majority thereof, which certificate shall show that the said check is issued in payment of some expense provided for by statute, or necessary incident for closing up the affairs of the Dispensary, or for services rendered said Commission in closing up the affairs of said Dispensary, or contracted for in accordance with law by said State Dispensary Commission, or that it is in payment of a claim of a creditor which had been adjudged by said Commission to be due, and upon such adjudication ordered paid."

This amendment in the clearest terms provides an exclusive condition to the recognition and payment of claims against the State on account of the operation of the State Dispensary, namely, that such claims shall be judicially examined and adjudicated by the Commission consent of a State that it may be sued is not a contract and can be repealed or modified at any time at the discretion of the State, even after suit has been commenced; and when the consent to the adjustment of claims

against it by suit is withdrawn by the State, the jurisdiction of the court in which the case is pending is at an end, and the suit falls to the ground. Beers *vs.* Arkansas, 61 U. S., 527, 15 L. Ed., 991; Ex parte Ayers, 123 U. S., 443, 31 L. Ed., 216; Hans *vs.* Louisiana, 134 U. S., 33 L. Ed., 842. It follows, therefore, if the Federal Court had jurisdiction under the original statute, it came to an end upon the enactment of the Statute of 24th February, 1908.

(382) The cases where States have held stock in banks along with others or as sole stockholders are so far apart from this case, that only one remark need be made as to them. In such case the bank is not a department of the State government, as the Dispensary was, but a corporate entity entirely apart from the State. The State has no right whatever to the bank's funds until the bank debts are paid, and it can confer no more right to convert them than can any other stockholder. Therefore any officer of the State undertaking to hold the funds of a bank against the bank or its creditors does so, not in accordance with the law, but in defiance of law. He cannot derive authority from the State for such conversion because the State can have no such authority to confer. Bank *vs.* Babney, 19 Wall. L.; State *vs.* Bank of the State, I. S. C., 63; Curren *vs.* State Bank of Arkansas, 15 How., 302. It may be under the principles which we have stated after the Commission has performed the duty imposed and exercised the discretion conferred by the State by examining into and deciding on the validity of a particular claim, the payment of that claim from the funds in its hands would be a ministerial act which it could be compelled to perform by mandamus or other appropriate remedy. That point is not before us. We hold that the State has not consented that any court should adjudicate the debts set up against it for liquor sold to it, nor has it consented that eight hundred thousand dollars of its public funds held by its fiscal officers shall be administered by any court; and hence the Federal Court had no jurisdiction to pass the order restraining the respondents from paying out such funds. The order of injunction of the Federal Court therefore, affords no legal protecton to the defendants and their return is adjudged insufficient.

The judgment of this court is that the petitioners are entitled to a writ of mandamus from this court requiring the respondents constituting the State Dispensary Commission, to pay from the funds in their hands to the State Treasurer the sum of fifteen thousand dollars for the use of the Attorney-General, as provided by the Statute of the State, approved 24th Feb-
(383) ruary, 1908. It is a well recognized principle however, that the United States Supreme Court itself follows the decision of the State Supreme Court in the construction of State

Constitutions and Statutes, and of course this rule is binding upon the Circuit Court of the United States.

The court will not therefore assume that the construction which it has placed upon the State Constitution and the Statutes in question, will be disregarded by the Federal Court.

The issuing of the peremptory writ of mandamus is therefore left in abeyance until the further order of this court.

A true copy.

[Seal] U. R. BROOKS, Clerk.

Traverse to the Return of the Defendants to the Rule and Order to Show Cause.

(384) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

IN EQUITY.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.

Traverse to the Return of the Defendants to the Rule and Order to Show Cause Herein.

And now come the Wilson Distilling Company and others, complainants herein, and travers the return of the defendants herein:

1.

They deny each and every allegation in said return contained not specifically admitted in the amended and supplemental bill of complaint of the complainants heretofore filed and made a part of the motion herein; and by way of further traverse to said return these complainants allege that the Act of the General Assembly of the State of South Carolina, entitled "An Act to provide for the Disposition of all property connected with the State Dispensary, and to wind up its affairs," approved on the 16th day of February, 1907, and set out in full in the sixth paragraph of complainants said amended and supplemental bill of complaint, created a trust for the specific purpose of paying all the just liabilities of the said State Dis-

pensary; that said defendants constituting the State Dispensary Commission duly accepted said trust, as trustees, and your orators and the other creditors of said State Dispensary duly accepted the benefits of said trust, as *cestuis que trust;* and complainants further show that, as they are advised and verily believe, said Act, and the acceptance by the defendants constituting the State Dispensary Commission, as trustees, of the trust created by said Act, and the acceptance by the complainants and the other creditors of said State Dispensary, as *cestuis que trust,* of the benefits of the trust so created, constituted a valid, binding and irrepealable contract within the meaning and pro-
(385) tection of the Constitution of the United States, and of Article 1, section 10, thereof, the protection whereof is hereby expressly claimed by your orators.

2.

Complainants further show that they are informed, advised and believe, and so aver the fact to be, that the Act of the General Assembly of said State entitled, "An Act to Annual an Act Entitled and Act to Provide for the Disposition of All Property Connected with the State Dispensary, and To Wind Up Its Affairs," So as To Provide Compensation for Members of the Said Commission for the Year 1908, and To Provide for the Sale of the Real Estate Heretofore used in Conducting the Dispensary, and To Further Provide for Winding Up the Affairs of the State Dispensary," Approved on the 24th of February, 1908, and being the same referred to and set out in whole or in part in the return of the defendants to the order and to rule to show cause herein, is unconstitutional, null and void, for that the same conflicts with Article 1, section 10, of the Constitution of the United States, and with Article XIV., section 1, of the Amendments thereof, and for that the same impairs and attempts to impair the obligation of the contract set out in the last preceding paragraph hereof, and deprives and attempts to deprive the complainants of their property without due process of law, and denies and attempts to deny to them the equal protection of the law, in violation of the aforesaid provisions of the Constitution of the United States; and your complainants hereby expressly claim their rights under, and invoke the protection of said constitutional provisions.

T. MOULTRIE MORDECAI,
FRANK CARTER and
H. C. CHEDESTER,
Solicitors for Complainants.

STATE OF NORTH CAROLINA,
County of Buncombe.

(386) T. Moultrie Mordecai, being sworn, says:

That he is one of the solicitors for the complainants in the above entitled suit, and that he verifies this traverse on behalf of said complainants; that said verification is made by this affiant for the reason that the corporate complainants are foreign corporations, and that no officer or agent of said corporations, or either of them, capable of making the said verification is present within the District of South Carolina, or at the place where said traverse was prepared, to the knowledge or belief of this affiant, and that none of the complainants who are natural persons are, and neither of said complainants is, present within said District of South Carolina, or at the place where said traverse was prepared, to the knowledge or belief of this affiant; and affiant further says that the foregoing traverse is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

T. MOULTRIE MORDECAI.

Sworn to and subscribed before me this the 27th day of March, 1908.

GILMER WELCH,

[Seal] Notary Public, Buncombe County, North Carolina.

Opinion on Motion to Vacate Injunction and Receivership Orders.

(387) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

IN EQUITY.

The Fleischmann Company, Complainant,
vs.
W. J. Murray et al., Defendants.
and
Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.

This is a motion to vacate injunction and receivership orders on the ground that they are predicated upon an interpre-

tation of the Act of 1907 as amended by the Legislature of 1908, in conflict with the interpretation thereof by the Supreme Court of South Carolina, in the case of The State of South Carolina, ex rel J. Fraser Lyon, as Attorney General, petitioner, *vs.* W. J. Murray et al., decided March 14, 1908.

As a general rule, this court will adopt the construction which the State Court puts upon a State statute. This is especially true as affecting the court's decision in respect to a rule of property.

The questions involved in this motion were determined by this court in an opinion rendered on the 29th day of February, 1908, in which, among other things, it was held that the act authorizing the appointment of the defendants as Commissioners to settle and adjust the outstanding indebtedness incurred by the State Dispensary created the fund in their hands a trust fund for the benefit of the complainants, and that the acceptance of the same by the defendants constituted them trustees holding such fund for the purpose contemplated by the statute.

The court having considered the opinion of the Supreme Court of South Carolina, which holds that this is a suit against (388) the State and therefore inhibited by the eleventh amendment, is of opinion that this court is not bound by the principles enunciated therein, inasmuch as it was rendered subsequent to the decision of this court and necessarily involves a construction of the Constitution of the United States.

In the case of Burgess *vs.* Seligman, 107 U. S., page 33, among other things the court says:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued." * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled con-

struction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal court was to wait for the State courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view."

Also, in the case of Pease *v.* Peck, 18 Rw., 599, the court says:

"When the decisions of the State court are not consistent, (389) we do not fell bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistant decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist also, when a cause is got up in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we fell bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State."

This court entertains the highest regard for the Supreme Court of South Carolina, and the greatest respect for its decisions, but inasmuch as its decision in this case was rendered after the rights of the complainants had accrued under the act, and subsequent to a determination by this court of the questions involved in a suit brought by the complainants, the court does not feel justified in adopting the opinion of that court as controlling in this particular case.

If the court had any doubt as to the correctness of its ruling, it would gladly yield to the decision of the State court, but having no such doubt, the motion of defendant is overruled.

At the time the court announced its opinion in this case, among other things, the court stated that if application should be made for the payment of the $15,000 appropriated by the Legislature for the State of South Carolina for the prosecution of parties charged with violation of law in connection with the management of the State Dispensary, that it would gladly authorize the same.

Inasmuch as it appears there will be funds amply sufficient to pay all debts and liabilities of the Commission after the payment of this amount, and in order that the State may not be embarrassed in its prosecution of those who may have violated its laws, the court will, of its own motion, sign an order authorizing the payment of the said amount to the Attorney General.

Order Dismissing Motion to Revoke Former Orders of Court Granting Injunctions and Appointing Receivers.

(390) Filed 27th day March, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,
IN EQUITY.

The Wilson Distilling Company et al.
vs.
W. J. Murray and others.
and
The Fleischmann Company
vs.
W. J. Murray and others.

Order Dismissing Motion.

This cause came on to be heard this day upon the motion of the defendants to set aside and revoke the former orders of this court granting injunctions and appointing receivers, and to dismiss this suit in accordance with the decision of the Supreme Court of the State of South Carolina, and, having been heard, and the court being of the opinion that it is not bound by said decision of said Supreme Court, and that the former orders of this court ought not to be set aside or revoked, and that this cause ought not to be dismissed:

It is now, on motion of counsel for complainants, ordered, adjudged and decreed that the motion of the defendants be, and the same is, hereby, denied with costs.

This March 27th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Order Granting Leave to Amend Bill and Amended Bill.

(391) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT.

IN EQUITY.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.
and
The Fleischmann Company, Complainant,
vs.
W. J. Murray et al., Defendants.
} Order.

On motion of the complainants in the first of the above entitled consolidated causes, it is ordered that said complainants have leave to amend their bill and amended bill of complaint herein.

This the 26th day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Amendment to Bill and Amended Bill.

(392) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

IN EQUITY.

Wilson Distilling Company et al., Complainants,
vs.
W. J. Murray et al., Defendants.
and
The Fleischmann Company, Complainant,
vs.
W. J. Murray et al., Defendants.
} Consolidated Causes.

Amendment to Bill and Amended Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

The complainants in the first of the above entitled consolidated causes, by leave of the court, amend their bill and amended

and supplemental bill of complaint heretofore filed herein, as follows, that is to say:

1.

Your orators show unto your honors, as they have heretofore shown, that the Act of the General Assembly of the State of South Carolina, entitled "An Act to provide for the Disposition of all Property connected with the State Dispensary, and to wind up its affairs," approved on the 16th day of February, 1907, and set out in full in the sixth paragraph of said amended and supplemental bill of complaint, created a trust for the specific purpose of paying all the just liabilities of the said State Dispensary; that said defendants constituting the State (393) Dispensary Commission duly accepted said trust, as trustees, and your orators and the other creditors of said State Dispensary duly accepted the benefits of said trust, as *cestuis que trust;* and your orators further show that, as they are advised and verily believe, said Act, and the acceptance by the defendants constituting the State Dispensary Commission, as trustees, of the trust created by said Act, and the acceptance by the complainants and the other creditors of said State Dispensary, as *cestuis que trust,* of the benefits of the trust so created, constituted a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States, and of Articles 1, section 10, thereof, the protection whereof is hereby expressly claimed by your orators.

2.

And your orators further show that they are informed, advised and believe, and so aver the fact to be, that the Act of the General Assembly of said State entitled "An Act to Amend an Act Entitled 'An Act To Provide for the Disposition of All Property Connected With the State Dispensary, and To Wind Up Its Affairs,' So as To Provide Compensation for Members of the Said Commission for the Year 1908, and To Provide for the Sale of the Real Estate Heretofore Used in Conducting the Dispensary, and To Further Provide for Winding Up the Affairs of the State Dispensary," Approved on the 24th day of February, 1908, and being the same referred to and set out in whole or in part in the return of the defendants to the order and rule to show cause herein, is unconstitutional, null and void, for that the same conflicts with Article 1, section 10, of the Constitution of the United States, and with Article XIV., section 1, of the Amendments thereof, and for that same impairs and attempts to impair the obligation of the contract

set out in the last preceding paragraph hereof, and deprives and attempts to deprive the complainants of their property without due process of law, and denies and attempts to deny to them the equal protection of the law, in violation of the aforesaid provisions of the Constitution of the United States; and your orators hereby expressly claim their rights under and invoke the protection of said constitutional provisions.

3.

(394) And your orators further show, that they are informed and believe and so aver the fact to be, that during the pendency of this cause and since the announcement by this court of its judgment and opinion to the effect that this court has jurisdiction in these causes, the Honorable J. Fraser Lyon, Attorney-General of the State of South Carolina, representing the defendants W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission in these causes, caused and procured to be instituted an action or proceeding against them the said defendants in the Supreme Court of the State of South Carolina, by and in the name of the State of South Carolina on the relation of the said the Honorable J. Fraser Lyon, Attorney-General of the State of South Carolina, as aforesaid, and the defence of the said action or proceeding in said Supreme Court of South Carolina was committed by the defendants last above named to the Honorable William F. Stevenson, one of the counsel of record representing the defendants in the above entitled causes in this court (he having been appointed as such counsel with the approval of the said the Honorable J. Fraser Lyon, Attorney-General of the State of South Carolina), and to other counsel representing the said defendants in these causes, including the Honorable J. Fraser Lyon, Attorney-General of said State of South Carolina; the action or proceeding so instituted having for its alleged object the granting by said Supreme Court of South Carolina of a mandamus requiring the said defendants to pay over to the said Attorney-General out of the trust fund created by said Act of 1907 the sum of fifteen thousand dollars appropriated, or attempted to be appropriated, by the General Assembly of said State out of said fund for the use of said Attorney-General, by an act of said General Assembly approved subsequently to the institution of those actions, and these complainants aver that both the Honorable J. Fraser Lyon, the Attorney-General of the State of South Carolina, and the Honorable W. F. Stevenson the counsel of the defendants in these causes either knew, or had good reason to believe, that (395) such an action or proceeding was not necessary for the

purpose of rendering said appropriation available, and that there would have been no objection made by any party to these causes or either of them to an order of this court releasing the said sum from the operation of the injunctions theretofore issued by this court, as had previously been done in another instance, at their request and upon their own motion, without objection, as will appear by reference to the record in these causes, and that the object and purpose of the institution of said action or proceeding in the Supreme Court of South Carolina was to hinder, delay and defeat the enforcement by this court of the trust created by the said Act of 1907, and the administration of said trust by this court in the above entitled action. And your orators therefore pray as they have heretofore prayed, etc.

T. MOULTRIE MORDECAI,
FRANK CARTER &
H. C. CHEDESTER,
Solicitors for Complainants.

STATE OF NORTH CAROLINA,
County of Buncombe.

(396) Frank Carter, being sworn, says:

That he is one of the solicitors for the complainants in the above entitled suit, and that he verifies this amendment to the bill and amended bill of complaint herein on behalf of said complainants that said verification is made by this affiant for the reason that the corporate complainants are foreign corporations, and that no officer or agent of said corporations, or either of them, capable of making the said verification is present within the District of South Carolina, or at the place where said amendment was prepared, to the knowledge or belief of this affiant, and that none of the complainants who are natural persons are, and neither of said complainants is present within said District of South Carolina, or at the place where said amendment was prepared, to the knowledge or belief of this affiant; and affiant further says that the foregoing amendment to said bill and amended bill of complaint is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

FRANK CARTER.

Sworn to and subscribed before me this the 26th day of March, 1908.

EUGENE WAY,
Notary Public, Buncombe County,
North Carolina.
Com. expiring Feb. 24th, 1909.

[Seal]

Order Revoking Order Requiring Defendants to Answer on Rules Day in April.

(397) Filed 27th day of March, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

Wilson Distilling Company et al.
vs.
W. J. Murray et al.
and
Fleischmann Company et al.
vs.
W. J. Murray et al.

Consolidated Causes.

The plaintiffs having this day amended their bill of complaint:

Ordered by the court that the order hitherto made requiring the defendants to demur plead or answer at the April Rules day be revoked and that the said defendants be required to demur, plead or answer at the next May Rules day.

This March 27th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Order to Pay Attorney General of South Carolina $15,000 Upon Application Therefor.

(398) Filed 27th day of March, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT,

IN EQUITY.

The Fleischmann Company
vs.
W. J. Murray et al.
and
Wilson Distilling Company
vs.
W. J. Murray et al.

In accordance with the opinion of the court filed herein on this date, it is

Ordered by the court, on its own motion, that the defendants herein pay to the Attorney-General of South Carolina the sum of $15,000, upon his application therefor, and the former orders of this court are hereby modified to the extent necessary to permit such payment.

Let a copy of this order be certified to the defendants severally.

This March 27th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Summons and Severance.

(399) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Wilson Distilling Company and others
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

Consolidated Causes.

Summons and Severance.

To all the defendants in the above stated causes, or either of them except the undersigned:

You and each of you are hereby invited to join with the undersigned defendants on or before the 25th day of March,

1908, to prosecute an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, to reverse two interlocutory orders made in the above stated causes at Chambers, by the Honorable Jeter C. Pritchard, Circuit Judge of the Fourth Judicial Circuit of the United States, as follows:

An order in the second of the above entitled causes, of date the 29th day of February, 1908, continuing the temporary restraining order theretofore granted therein and granting an injunction pendente lite.

An order in both of the above entitled causes of date the 7th day of March, 1908, granting an injunction pendente lite and appointing receivers.

Or you will be deemed to have acquisced in said orders and the undersigned will prosecute said appeal without joining you as a party, and on Friday, March 27th, 1908, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, will apply to the Honorable Jeter C. Pritchard, Circuit Judge of the Fourth Judicial Circuit, at his Chambers, at Asheville, N. C., (400) for an order of severance.

W. J. MURRAY,
JOHN McSWEEN,
AVERY PATTON.

As constituting the "State Dispensary Commission" and individually, Defendants.

March 20th, 1908.

Personally comes W. F. Stevenson, who, on oath, says he mailed by registered mail prepaid copies of the within notice to the below named defendants, on March 20th, 1908, to their respective addresses as coming from J. Fraser Lyon, Atty. Genl., and that the other defendants have all agreed in writing or by their attorneys at law to join in said appeal and authorized their names to be embraced in said petition.

W. F. STEVENSON.

Sworn to before me this March 20th, 1908.

E. B. WILSON,
Not. Public for S. C.

Farmers & Merchants Bank, Walterboro, S. C.
B. F. Arthur, Union, S. C.
C. K. Henderson, Aiken, S. C.

Piedmont Savings and Investment Company, Greenville, S. C.
The Peoples Bank of Union.
The Bank of Aiken.
The Bank of Hartsville.
The Commercial and Savings Bank, Florence, S. C.
The Farmers & Merchants Bank, Anderson, S. C.
The Merchants & Planters Bank, Gaffneys, S. C.
The Bank of Dillon.
The Central National Bank, Spartansburg.
The Enterprise Bank, Charleston.
The First National Bank, Spartansburg.
The Merchants and Farmers Bank, Spartansburg.
The City National Bank, Greenville, S. C.
(401) The People National Bank, Charleston.
The Lexington Savings Bank, Lexington.
The Greenville Savings and Trust Co., Greenville.
Norwood National Bank, Greenville.
The People Savings Bank, Abbeville.
Commercial Bank of Camden.
National Exchange Bank, Chester.
The Bank of Orangeburg.
The People Loan and Exchange Bank, Laurens.
The Bank of Charleston.
The Bank of Aiken.

Affidavit of W. J. Murray.

(402) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Wilson Distilling Company and others
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

SOUTH CAROLINA, }
Richland County, } *ss:*

W. J. Murray, being duly sworn, says that the "Summons and Severance" herein, a copy of which is hereto attached having been duly served on March 20, 1908, by registered mail on

the defendants B. F. Arthur, C. K. Henderson, The Bank of Aiken, of Aiken, South Carolina, The Peoples Bank of Union, of Union, South Carolina, The Piedmont Savings and Investment Company, of Greenville, South Carolina, The Merchants and Farmers Bank of Spartanburg, of Spartanburg, South Carolina, as appears by the affidavit of mailing of W. F. Stevenson on file herein and the post-office registry receipts and registry return receipts in the possession of counsel for the defendant, the State Dispensary Commission.

The said defendants, The Bank of Aiken, of Aiken, South Carolina, and The Merchants and Farmers Bank of Spartanburg, South Carolina, have responded thereto declining to join in the said appeal while the other defendants named above as having been served with said Summons and Severance have failed to make any response thereto whatever.

(403) W. J. MURRAY.

Sworn to before me this 26th day of March, 1908.

T. H. MEIGHAN,
[Seal] Notary Public for South Carolia.

(404)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Wilson Distilling Company and others
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

Summons and Severance.

To all the defendants in the above stated causes, or either of them, except the undersigned:

You and each of you are hereby invited to join with the undersigned defendants on or before the 25th day of March, 1908, to prosecute an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, to reverse two interlocutory orders made in the above stated causes at Chambers, by the Honorable Jeter C. Pritchard, Circuit Judge of the Fourth Judicial Circuit of the United States, as follows:

An order in the second of the above entitled causes, of date the 29th day of February, 1908, continuing the temporary restraining order theretofore granted therein and granting an injunction pendente lite.

An order in both of the above entitled causes of date the 7th day of March, 1908, granting an injunction pendente lite and appointing receivers.

Or you will be deemed to have acquiesced in said orders and the undersigned will prosecute said appeal without joining you as a party, and on Friday, March 27th, 1908, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, will apply to the Honorable Jeter C. Pritchard, Circuit Judge of the Fourth Judicial Circuit, at his Chambers, at Asheville, N. C.,
(405) for an order of severance.

W. J. MURRAY,
JOHN McSWEEN,
AVERY PATTON,
As constituting the "State Dispensary Commission"
and individually, Defendants.

March 20th, 1908.

Petition for Allowance of Appeal.

(406) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Wilson Distilling Company and others *vs.* W. J. Murray et al. The Fleischmann Company *vs.* W. J. Murray et al.	Consolidated Causes.

Petition for Allowance of Appeal.

The State Dispensary Commission of South Carolina and W. J. Murray, John McSween and Avery Patton, constituting said Commission (C. K. Henderson and B. F. Arthur having resigned as Commissioners and their offices still being vacant); and W. J. Murray, John McSween and Avery Patton, as individuals, and all the other defendants in said causes, or either of them, except B. F. Arthur, C. K. Henderson, The Bank of

Aiken, of Aiken South Carolina, The Peoples Bank of Union, of Union, South Carolina, The Piedmont Savings and Investment Company, of Greenville, South Carolina, and the Merchants and Farmers Bank of Spartanburg, of Spartanburg, South Carolina, who, after due summons and notice, have failed and refused to join in this appeal, conceiving themselves to be aggrieved by the interlocutory order made and entered in the above cause of The Fleischmann Company, complainant, *vs.* W. J. Murray et al., defendants, in the above entitled court, on the twenty-ninth day of February, 1908, and also by the interlocutory order made and entered in the above entitled cause of Wilson Distilling Company et al. *vs.* W. J. Murray and others, and the Fleischmann Company *vs.* W. J. Murray and others—consolidated causes—in the above entitled court, on the seventh day of March, 1908, wherein and whereby it was ordered and decreed in the cause of the Fleischmann Company, complainant, *vs.* W. J. Murray et al., defendants, that the temporary restraining order heretofore issued in said cause on the twenty-second day of January, 1908, be and the same is hereby continued in full force and effect until the final determination (407) of said suit, or until the further order of this court, and that the defendants and each of them, their agents, attorneys and employees, be restrained and ejoined from interfering with, paying out or transferring to any person, or persons whomsoever, or in any way disturbing or changing the present status of the fund now in their possession and control, or from taking any steps with reference to said fund tending to or which may put the same beyond the jurisdiction of this court, and directing that an injunction pendente lite issue in accordance with said order, and wherein and whereby it was ordered and decreed in said cause of The Wilson Distilling Company et al. *vs.* W. J. Murray and others, and The Fleischmann Company *vs.* W. J. Murray and others—consolidated causes—that the temporary restraining order heretofore issued in the first entitled cause be and the same is hereby continued in full force and effect until the final determination of said suit, or until the further order of this court, and that the defendants, and each of them, their agents, attorneys and employees, be restrained and enjoined from interfering with, paying out or transferring to any person, or persons whomsoever, or in any way disturbing or changing the present status of the fund now in their possession and control, except to transfer, pay over and deliver same to the receivers named in this order; and further ordering and decreeing that Joseph A. McCullough, C. K. Henderson and B. F. Arthur be appointed receivers of this court for the purpose of holding and administering the trust fund now in the hands of the defendants and authorizing said receivers to take immediate

possession of all and singular, the money, funds, property, rights, credits and assets described in said cause; and further ordering and decreeing that the defendants and each of them be required and commanded to pay over and deliver to said receivers upon demand made by them, all of said moneys, funds, property, rights, credits or assets, or any part of the same, and all other property of the defendants of whatever kind or character, which the defendants constituting the State Dispensary Commission now have in their possession or under their control (408) by virtue of the Act of the General Assembly of the State of South Carolina, passed at its session held in 1907, creating the said State Dispensary Commission; and further ordering and decreeing that all of the parties to this cause and all other persons whomsoever, their agents and attorneys, be restrained and enjoined from interfering in any way with the receivers hereby appointed, or with their possession and control of the money and other property hereby ordered to be transferred to them, by which interlocutory orders the restraining order was continued and the complainants were awarded a preliminary injunction against the defendants and by which receivers were appointed, hereby petition said court for an order allowing these defendants, and each of them, to prosecute an appeal from said interlocutory orders continuing the restraining order heretofore granted and granting preliminary injunctions and appointing receivers, and from each of said orders, to the United States Circuit Court of Appeals for the Fourth Circuit, under and according to the laws of the United States in that behalf made and provided.

And your petitioners further pray that a transcript of the records, papers and proceedings upon which said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit.

And your petitioners will ever pray, &c.

J. FRASER LYON,
ABNEY & MULLER,
STEVENSON & MATHESSON,
ANDERSON, FELDER, ROUNDTREE & WILSON,
Solicitors for Petitioners.

March 27th, 1908.

Assignment of Errors.

(409) Filed March 27th, 1908.

THE UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA, IN THE CIRCUIT COURT, FOURTH CIRCUIT.

IN EQUITY.

Wilson Distilling Company and others
vs.
W. J. Murray and others.
and
The Fleischmann Company
vs.
W. J. Murray and others.

Consolidated Causes.

Assignment of Errors.

The State Dispensary Commission of South Carolina, and W. J. Murray, John McSween and Avery Patton, constituting said Commission (C. K. Henderson and B. F. Arthur having resigned as Commissioners and their office still being vacant); and W. J. Murray, John McSween and Avery Patton as individuals, and all the other defendants in said causes, or either of them, except B. F. Arthur, C. K. Henderson, The Bank of Aiken, of Aiken, South Carolina, The Peoples Bank of Union, of Union, South Carolina, The Piedmont Savings and Investment Company of Greenville, South Carolina, The Merchants and Farmers Bank of Spartanburg, of Spartanburg, South Carolina.

Who, after due summons and notice, have failed and refused to join in this appeal, file the following assignments of error upon which they and each of them will reply upon their appeal from the interlocutory orders made in the above stated causes at Chambers by the Honorable Jeter C. Pritchard, Circuit Judge of the Fourth Judicial Circuit of the United States, as follows:

An order in the said case of The Fleischmann Company *vs.* W. J. Murray et al., of date of the 29th day of February, 1908, continuing the temporary restraining order theretofore granted,
(410) and granting an injunction in said cause.

An order in the two above entitled consolidated causes of date the 7th day of March, 1908, continuing the said temporary restraining order and granting an injunction and appointing receivers in said two consolidated causes.

These defendants assign as error upon this appeal the following, viz.:

FIRST ASSIGNMENT OF ERROR.

The Honorable Circuit Judge above named erred in making the said interlocutory orders, to-wit, the said interlocutory order continuing the temporary restraining order and granting an injunction, and the said interlocutory order continuing the restraining order, granting an injunction and appointing receivers.

(a)

Because the complainants by and in their bills of complaint have not stated such causes as do or ought to entitle them to the relief provided for therein or to the said orders granting injunctions and appointing receivers.

(b)

Because these suits are, and on the face of the complainants' bills and on all the other pleadings, proceedings, and affidavits herein, appear to be, in effect suits against the State of South Carolina whereas the said State has not consented to be impleaded in said suits, and whereas under the Eleventh Amendment to the Constitution of the United States the jurisdiction of this Honorable Court does not extend thereto.

(c)

Because the State of South Carolina is, and on the face of complainants' bills and on all the other pleadings, proceedings and affidavits herein, appears to be, and indispensable party to said suits, whereas the said State has not consented to be made a party thereto, and whereas under the Eleventh Amendment to the Constitution of the United States the said State cannot (411) be made a party thereto without her consent.

(d)

Because the defendants as the State Dispensary Commission under the Act of the General Assembly of the State of South Carolina creating the same, entitled "An Act to, provide

for the disposition of all property connected with the State Dispensary, and to wind up its affairs," approved February 16th, 1907, and the Acts Amendatory thereto constitute a court of the State of South Carolina within the meaning of Section 720 of the Revised Statutes of the United States which declare that:

"The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

(e)

Because the bills of the complainants are multifarious as to parties, in that in each of said bills the complainants are without a common interest in the subject of litigation, have no connection with each other, and are seeking thereby each for itself for the collection of its own alleged separate and distinct claim and the protection of its own alleged separate and distinct interest.

(f)

Because in the case of each of said bills it appears on the face thereof that it sets forth no ground for equitable jurisdiction such as insolvency or otherwise upon which the jurisdiction in equity of this Honorable Court can attach.

(g)

Because the said funds in the hands of these defendants belong to and are subject to the disposition of the State of South Carolina, and are not, as the Circuit Judge appears to have considered a special trust fund impressed with a trust in favor of complainants and other creditors of the State of South Carolina in connection with the said State Dispensary.

(412) (h)

Because the said orders were improvidently made, in that neither the bills of complainants nor the said bills with the other pleadings, proceedings and affidavits herein state or make out a proper or sufficient case for the granting of an injunction or the appointment of a receiver in said causes or either of them.

SECOND ASSIGNMENT OF ERROR.

For the reasons stated in the first assignment of error, as well as others, his honor in and by said orders erred in continuing the temporary restraining order theretofore granted.

THIRD ASSIGNMENT OF ERROR.

For the reasons stated in the first assignment of error as well as others, his honor in and by said orders erred in granting said injunctions.

FOURTH ASSIGNMENT OF ERROR.

For the reasons stated in the first assignment of error, as well as others, his honor, in and by said order in the two consolidated causes, erred in appointing said receivers.

FIFTH ASSIGNMENT OF ERROR.

For the reason stated in the first assignment of error, as well as others, his honor erred in assuming jurisdiction of said causes and in making any order or orders therein.

SIXTH ASSIGNMENT OF ERROR.

The Honorable Circuit Judge further erred as follows:

(a) In holding that the State of South Carolina in the establishment and conduct of its said State Dispensary was not performing one of the functions pertaining to the State in its governmental relations.

(b) In holding that said State could not engage in and conduct the business of its State Dispensary under the Acts of its Legislature authorizing the same without losing its im-
(413) munity from suit as conferred by the Eleventh Amendment to the Federal Constitution in regard to transactions connected with such business.

In order that the foregoing assignment of errors may be and appear of record these defendants present the same to the court and pray that such disposition to be made thereof in accordance with law and the statutes of the United States in such cases made and provided.

And upon said assignment of errors these defendants pray that said interlocutory orders may be reversed.

All of which is respectfully submitted.

J. FRASER LYON,
ABNEY & MULLER,
STEVENSON & MATHESSON,
ANDERSON, FELDER, ROUNDTREE & WILSON,
Solicitors for the Appealing Defendants.

March 27th, 1908.

Order Allowing an Appeal and Severance.

(414) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Wilson Distilling Company and others
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

Order Allowing an Appeal and Severance.

This day came the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween and Avery Patton, constituting said Commission (C. K. Henderson & B. F. Arthur having resigned as Commissioners and their office still being vacant); and W. J. Murray, John McSween and Avery Patton as individuals, and all the other defendants in said causes, or either of them, except B. F. Arthur, C. K. Henderson, The Bank of Aiken, of Aiken, South Carolina, The People Bank of Union, of Union, South Carolina, The Piedmont Savings and Investment Company of Greenville, South Carolina, and The Merchants and Farmers Bank of Spartanburg, of Spartanburg, South Carolina (who it appears, after due summons and notice, have failed and refused to join in said appeal); and presented their petition for an appeal herein and an assignment of errors accompanying the same which petition upon consideration is hereby granted and the appeal therein prayed for is hereby allowed from said interlocutory order to the United States Cir-

cuit Court of Appeals for the Fourth Circuit, and the said defendants presenting said petition and assignment of error accompanying the same, are hereby granted their several appeals as aforesaid and their interests are severed in said appeal from the other defendants in said causes, or either of them.

This March 27th, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Bond on Appeal.

(415) Filed March 27th, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

The Wilson Distilling Company and others *vs.* W. J. Murray et al. The Fleischmann Company *vs.* W. J. Murray et al.	Consolidated Causes.

Know all men by these presents, that we, the State Dispensary Commission and W. J. Murray, as principals, and The United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are jointly and severally held and bound unto the Wilson Distilling Company, and The Fleischmann Company and other complainants in the above entitled consolidated causes or either of them in the sum of one thousand dollars ($1,000), lawful money of the United States of America, to be paid to the said complainants, this successors, executors or administrators for which payment well and truly to be made we bind ourselves, our successors, heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the 27th day of March, 1908.

The condition of the above obligation is such, that, whereas the said W. J. Murray and John McSween and Avery Patton constituting the State Dispensary Commission and as individuals and other defendants with them as indicated in the petition for appeal herein have taken an appeal to the Circuit Court of Appeals for the Fourth Circuit to reverse and correct two interlocutory orders rendered by the Honorable Jeter C. Pritchard, Circuit Judge, in the two above entitled cause as follows:

An order in the said case of The Fleischmann Company *vs.* W. J. Murray et al., of date the 29th day of February, 1908. (416) An order in the two above entitled consolidated causes of date the 7th day of March, 1908.

As indicated in said petition for appeal.

Now the condition of the above obligation is such that if the above mentioned appealing defendants shall prosecute said appeal to effect, and answer all costs, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

STATE DISPENSARY COMMISSION, [L. S.]
By W. J. MURRAY, Chairman.
W. J. MURRAY, [L. S.]
THE UNITED STATES FIDELITY &
GUARANTY CO. OF BALTIMORE, MD., [Seal]
ROBT. MOORMAN, Attorney in fact.
J. A. BOLLIN, Attorney in fact.

The within bond is hereby approved this 27th day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Citation.

(417)
UNITED STATES OF AMERICA, } *ss:*

The President of the United States to Wilson Distilling Company, Anheuser-Busch Brewing Association, and Charles J. Gallagher, Jr., and Edward Burton, partners as Gallagher & Burton, and John M. Cranston, trading as Jack Cranston Company, and to The Fleischmann Company, and to Big Springs Distilling Company, a corporation of Savannah, Georgia, Ullman and Company of Cincinnati, Ohio, Anchor Distilling Company of Cincinnati, Ohio, Belair Distilling Company, Richard and Company, D. Sachs and Sons, New York and Kentucky Company, of Rochester, New York, and Garrett & Company:

Your are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit to be holden at Richmond, Virginia, thirty days from this date, pursuant to an appeal from two interlocutory orders

made in the two consolidated causes of Wilson Distilling Company and others *vs.* W. J. Murray and others, and The Fleischmann Company *vs.* W. J. Murray and others, wherein you are complainants, and W. J. Murray and others, are defendants, in your favor and against them, to-wit:

An order in the said case of The Fleischmann Company *vs.* W. J. Murray and others, of date the 29th day of February, 1908, continuing the temporary restraining order therefore granted and granting an injunction in said cause; and

An order in the said two consolidated causes of date the 7th day of March, 1908, continuing the said temporary restrain-
(418) ing order and granting an injunction and appointing receivers in said two consolidated causes.

To show cause if any there be why the said interlocutory orders should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Jeter C. Pritchard, Judge of the Circuit Court of the United States for the Fourth Circuit, this 27th day of March, 1908.

J. C. PRITCHARD,
U. S. Circuit Judge.

Filed March 27, 1908.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(419)

The Wilson Distilling Company *vs.* W. J. Murray et al.	Consolidated Causes.
The Fleischmann Company *vs.* W. J. Murray et al.	

We hereby acknowledge service of the citation on appeal herein, of date March 27th, 1908, and receipt of a copy thereof this 2nd day of April, 1908.

T. MOULTRIE MORDECAI,
FRANK CARTER &
H. C. CHEDESTER,
Solicitors for the following named complainants: Wilson Distilling Co., Gallagher & Burton, John M. Cranston.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(420)

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

Consolidated Causes.

We hereby acknowledge service of the citation on appeal herein, of date March 27th, 1908, and receipt of a copy thereof this 2nd day of April, 1908.

MERRICK & BARNARD,

Solicitors for the following named complainants: The Fleischmann Company.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(421)

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

Consolidated Causes.

We hereby acknowledge service of the citation on appeal herein, of date March 27th, 1908, and receipt of a copy thereof this 4th day of April, 1908.

NELSON & NELSON,
OSBORNE & LAWRENCE,

Solicitors for the following named complainants: Ullman & Co., Anchor Distilling Company, D. Sachs & Sons, Big Springs Distilling Co., Belair Distilling Co., Richard & Co.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(422)

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

We hereby acknowledge service of the citation on appeal herein, of date March 27th, 1908, and receipt of a copy thereof this 10th day of April, 1908.

OSBORNE & LAWRENCE,

Solicitor for the following named complainants: Big Springs Distilling Company, Ulman & Company, Anchor Distilling Company, Belair Distilling Company, Richard & Company, D. Sachs & Sons.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(423)

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

We hereby acknowledge service of the citation on appeal herein, of date March 27th, 1908, and receipt of a copy thereof this 4th day of April, 1908.

WESTON & AYCOCK,

Solicitors for the following named complainants: New York and Kentucky Co.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(424)

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

We hereby acknowledge service of the citation on appeal herein, of date March 27th, 1908, and receipt of a copy thereof this 9th day of April, 1908.

W. E. DANIEL,
Solicitor for the following named complainants: Garrett & Co.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA. IN EQUITY.

(425)

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated Causes.

THE STATE OF SOUTH CAROLINA,
County of Charleston, } *ss:*

J. D. Adams, being duly sworn, says that he is United States Marshal for the District of South Carolina, and that he served the citation on appeal herein of date March 27th, 1908, on T. Moultrie Mordecai, Esq., as solicitor of record for the complainant Anheuser-Busch Brewing Association, by delivering a copy of same to him personally and leaving the same with him at Charleston, S. C., on the 18th day of April, 1908.

J. DUNCAN ADAMS,
U. S. Marshal.
By V. V. CLAYTON, Deputy.

Sworn to and subscribed before me this 18th day of April, 1908.

N. M. PORTER,
Not. Pub. for S. C.

[Notarial Seal]

Order Striking Anheuser Busch Brewing Association from Record.

(426) Filed 18th day of April, 1908.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, IN EQUITY.

The Wilson Distilling Company
vs.
W. J. Murray et al.

The Fleischmann Company
vs.
W. J. Murray et al.

} Consolidated causes

It appearing to the court that Anheuser Busch Brewing Association, one of the complainants herein, prior to the hearing and determination of the order of injunction and appointment of receivers, ceased to have any interest in the litigation, they having been settled with.

It is ordered that the name of Anheuser Busch Brewing Association be, and the same is hereby, stricken from the record, as a party complainant.

WM. H. BRAWLEY,
U. S. Judge.

April 18th, 1908.

We consent.

T. MOULTREE MORDECAI,
FRANK CARTER,
H. C. CHEDESTER.

Order to Transmit Record.

(427) And, thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

[Seal of Court]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Clerk's Certificate.

UNITED STATES OF AMERICA, DISTRICT OF SOUTH CAROLINA,
IN THE CIRCUIT COURT, FOURTH CIRCUIT.
IN EQUITY.

(428) I, C. J. Murphy, Clerk of the Circuit Court of the United States for the District of South Carolina, do hereby certify that the foregoing is a true and correct copy of all records and proceedings in the cases of Wilson Distilling Company, complainant, against W. J. Murray et al., defendants, and The Fleischmann Company, complainant, against W. J. Murray et al., defendants, and the consolidated cases of Wilson Distilling Company et al., and The Fleischmann Company, complainants, against W. J. Murray et al., defendants, rendered as aforesaid, together with the interlocutory orders and all things relating to the same, as appears by the records now on file in my office.

Given under my hand and seal of said court, at {Seal of Court} clerk's office, in the City of Charleston, S. C., in the district aforesaid, this 20th day of April, A. D., 1908.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Stipulation.

(429)
UNITED STATES OF AMERICA, IN THE CIRCUIT COURT OF APPEALS, AT RICHMOND, FOURTH CIRCUIT.

W. J. Murray et al., Complainants in Error,
vs.
Wilson Distilling Company et al., Defendants in Error.

W. J. Murray et al., Complainants in Error,
vs.
Fleischmann Company et al., Defendants in Error.

It is hereby stipulated between counsel in accordance with the provisions of the Rule of this court, that there shall be omitted from the printed transcript of the record in these causes, so much of the same as contains the evidence in the case of Ullman & Co. before the State Dispensary Commission and that

on the argument of the cause, counsel on either side may refer to all or any portion of said evidence so omitted, a certified typewritten copy thereof being retained by the clerk of this court from the record transmitted to him for the purpose of such reference if need be.

T. MOULTRIE MORDECAI,
FRANK CARTER &
A. C. CHEDESTER,
GEO. B. LESTER,
MERRICK & BARNARD.

Stipulation to Omit from Printed Records Evidence in Ullman Case.

(430) Filed May 4, 1908.

UNITED STATES OF AMERICA, IN THE CIRCUIT COURT OF APPEALS, AT RICHMOND, FOURTH CIRCUIT.

W. J. Murray et al., Complainants in Error,
vs.
Wilson Distilling Company et al., Defendants in Error.

W. J. Murray et al., Complainants in Error,
vs.
Fleischmann Company et al., Defendants in Error.

It is hereby stipulated between counsel in accordance with the provisions of the Rule of this court, that there shall be omitted from the printed transcript of the record in these causes, so much of the same as contains the evidence in the case of Ullman & Co. before the State Dispensary Commission and that on the argument of the cause, counsel on either side may refer to all or any portion of said evidence so omitted, a certified typewritten copy thereof being retained by the clerk of this court from the record transmitted to him for the purpose of such reference if need be.

T. MOULTREE MORDECAI,
J. FRASER LYON,,
STEVENSON & MATHESON,
ANDERSON, FELDER, ROUNDTREE & WILSON,
ABNER & MULLER,

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 821.

W. J. Murray, John McSween, Avery D. Patton et al., Appellants,
vs.
Wilson Distilling Company, et al., and The Fleischmann Company, Appellees.

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

April 27, 1908, transcript of record is filed and the cause is docketed.

Same day, appearance of J. Fraser Lyon, Attorney General of South Carolina, W. F. Stevenson, B. L. Abney, J. S. Muller, and D. W. Rountree for the appellants, orders filed.

May 4, 1908, appearance of T. Moultrie Mordecai, Alf S. Barnard and George B. Lester for the appellees, orders filed.

May 8, 1908, twenty copies of the printed record are filed.

Motion of Appellees to Dismiss Appeal.

Filed May 23, 1908.

UNITED STATES OF AMERICA,

CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT, AT RICHMOND, VA.

No. 821.

W. J. Murray et al., Appellants,
vs.
Wilson Distilling Co. et al., Appellees.

The appellees hereby enter an appearance for that purpose and move the court to dismiss the appeal in this cause because the appellants did not docket the case and file the record thereof with the clerk of this court by or before the return day of the

citation; the said citation being dated the 27th day of March, 1908, and the appellants being required to docket the case and to file the record "by or before" the return day of said citation, which return day was thirty days from said 27th day of March, 1908, and said case was not docketed and the record was not filed "by or before" the expiration of said thirty days, nor was there any order enlarging the time for docketing the case and filing the record.

This 23rd day of May, 1908.

GEO. B. LESTER, and
ALFRED S. BARNARD,
Of counsel for appellees.

Afterwards, to-wit: on May 26, 1908, (May Term, 1908), the cause came on to be heard on the motion of the appellees to dismiss and on the merits before Chief Justice Fuller, and District Judges Waddill and Boyd, and is argued by counsel, and submitted.

Afterwards, at the same term, to-wit: on September 15, 1908, the court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed Sept. 15, 1908.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 821.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, ET AL.,
Appellants,

versus

WILSON DISTILLING COMPANY, ET AL., AND THE FLEISCHMANN COMPANY, Appellees.

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

[Argued May 26, 1908. Decided September 15, 1908.]

Before FULLER, Chief Justice, and WADDILL and BOYD, District Judges.

Argued by B. L. ABNEY, W. F. STEVENSON and D. W. ROUNTREE for appellants; (ANDERSON, FELDER, ROUNTREE & WILSON, ABNEY & MULLER, STEVENSON & MATHESON and J. FRASER LYON are on the briefs); and by T. MOULTREE MORDECAI and ALFRED S. BARNARD, SIMEON HYDE for appellees; (FRANK CARTER, H. C. CHEDESTER and GEO. B. LESTER are on the briefs.)

STATEMENT OF FACTS.

In 1892 the South Carolina legislature passed an act establishing what was called a "State Dispensary." Under the provisions of this act private individuals were forbidden to engage in either the manufacture or sale of intoxicating liquors

of all kinds and the right to carry on the liquor business in the State of South Carolina was reserved to the State. The act provided for a board of control of the Dispensary consisting of the Governor, the Comptroller-General and Attorney-General, and to this board was committed the duty of conducting and managing the State Dispensary. The business of the Dispensary, under and by virtue of the act referred to, was inauguarated under the control of the agencies designated and became the only legalized method of dealing in intoxicating liquors within the State. Among other provisions of the act were that a State Commissioner should be appointed by the Governor and that said Commissioner should turn over monthly to the Treasurer of the State the amount received from sales of liquors made by him, and the Treasurer was required to keep a separate account of said fund, and the Commissioner was authorized, with the approval of the board of control from time to time to draw warrants upon the funds in the hands of the Treasurer for the amounts necessary to pay the expenses incurred in conducting the business. It was also provided that in counties complying with the requirements of the act county dispensaries might be established and these latter were required to buy supplies of liquor from the State Dispensary, and the State Dispensary was required to sell to the county dispensaries supplies and intoxicating liquors at a profit of not more than fifty (50) per cent. At the outset there was appropriated by the State for the purpose of starting the Dispensary system the sum of $50,000, which amount has since been repaid to the State from the Dispensary receipts. In the year 1896 the board of control was changed so that instead of being constituted as above set forth it was made to consist of five members, to be elected by the General Assembly, each of said members being required to give a bond in the sum of $10,000, and the control and management of the Dispensary was conferred by law upon them. This board, as above stated, was required to furnish liquor to the county dispensers and the latter were required to remit the net proceeds of the sale of liquor to the State Treasurer. All bills for the purchase of liquor were paid by the State Treasurer upon warrants drawn by the Commissioner. Thus the sale of intoxicating liquors was conducted in South Carolina under the several acts of the legislature of that State and by the machinery provided for the purchase of liquors by the Commissioner under the direction of the board of control

of the State Dispensary and sale of liquors by the State Dispensary to the county dispensers who, in turn, sold and remitted the money arising from the sales to the State Treasurer, the expenses of operating the State Dispensary, together with all bills for spirits purchased, being paid by the State Treasurer from the Dispensary fund, which was kept separate, upon warrants of the Commissioner, approved by the board of control. By the acts of 1902 all net income derived by the State from the sale of liquors in the State under the Dispensary law was required to be apportioned among the several counties of the State for the benefit of the common schools in proportion to the deficiencies existing in the counties and so forth; and the said acts further required that the directors of the State Dispensary should pay over to the State Treasurer by January 1, 1904, in equal semi-annual payments, all of the school fund reported by them in excess of $400,000 for the benefit of the common schools of the State, to be apportioned, as above stated. The business of the State Dispensary continued from the date of its establishment in 1892 until the year 1907, when the General Assembly of South Carolina passed an act entitled "An Act to Declare the Law in Reference to, and Regulate the Manufacture and Sale, Use, etc., of, Liquors and Beverages Within the State and Police the Same." By Section 47 of this Statute it was enacted that the State Dispensary be abolished. This act was approved on the 16th day of February, 1907. At the same session of the legislature another act was passed, which was approved on the same day as the last named act, entitled "An Act to Provide for the Disposition of all Property Connected with the State Dispensary and to Wind up its Affairs," which is as follows:

(Session Laws, S. C., 1907.)

No. 402.

An Act to provide for the disposition of all property connected with the State Dispensary, and to wind up its affairs.

Sec. 1. Be it enacted by the General Assembly of the State of South Carolina, that immediately upon the approval of this Act, the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom

shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

Sec. 2. Said Commission shall immediately organize by the election of a Chairman and a Secretary from their number.

Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate; Provided, that no alcoholic liquors or beers shall be disposed of within the State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State; Provided, further, that all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

Sec. 4. The compensation of each member of said Commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged. Provided, that they shall receive no compensation for services rendered on this commission after January 1, 1908.

Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses

allowed by this Act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated, a report in full of their actings and doings.

Sec. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, A. D., 1906, be and hereby is, conferred upon the Commission provided for under this Act. Provided, that for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Approved, the 16th day of February, A. D., 1907.

By virtue of this act W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton were duly appointed and qualified as commissioners and they entered upon the discharge of their duties as such. They proceeded to sell the personal property and collect the debts due to the Dispensary,, and the State Treasurer of South Carolina, paid over to them about $129,000 which he had in hand standing to the credit of the Dispensary fund and, all together from the sale of the property, the collection of debts and the amount paid over by the State Treasurer, there came to the hands of these commissioners about the sum of $800,000 to be administered by them under the provisions of the law above set out. That the money thus realized from time to time, received by the defend-

ants who constitute the State Dispensary Commission, was, at the time of the commencement of this suit, in the hands of the Commission or deposited in banks in the State of South Carolina, subject to the check of the Commission, and no part of the said money is in the Treasury of the State of South Carolina or has been in any way mingled with the funds of the said State, but has been kept separate and apart in the hands of said Commission, subject to its absolute control and disposition. The total amount of claims for liquors and supplies furnished, outstanding against the State Dispensary, was about $600,000, held by various corporations, partnerships and persons, among whom were the original complainants and the several intervening complainants in this action. It further appears from the record that the complainants furnished to the defendants, at their request, itemized statements of their accounts against the State Dispensary and the said accounts were, by comparison with the books kept by the Dispensary, found to be in substantial agreement with said books. It further appears that the accounts of complainants were audited at the instance of the defendants and that the several amounts which are claimed were found to be correct. As the several complainants and intervenors in this action base their rights practically upon the same grounds, we will, in order to avoid confusion in the further presentation of the case, treat alone of the claim of The Fleischmann Company, one of the original complainants, the balance due said company being, as alleged, the sum of $66,501.10, which said claim, as before stated, was presented to the Dispensary Commission, was compared with the books kept by the State Dispensary and also audited, as above stated, and found to be, as alleged, substantially correct. This complainant alleges further that this claim was duly presented to the Dispensary Commission and payment thereof demanded before the bringing of this action, and defendants refused to pay the same or any part thereof. It further appears that at the time the defendants took charge of the affairs of the State Dispensary, to close them up under the provisions of the Act of the Legislature, there was, among other liquors on hand, some of that which had been bought from the The Fleischmann Company, and by agreement between the complainant and the Commission this was returned to the complainants and credited on the claim of the latter. It also appears that other liquors and supplies for which the complainant, The Fleischmann Company, makes

claim had been disposed of by the State Dispensary authorities, in the course of the operations of the Dispensary, before the defendants in the present action took charge.

In order to give a full understanding of the questions presented, we set out the original bill filed by The Fleischmann Company, with the answer of the respondents thereto. This complainant afterwards filed an amended and supplemental bill, but it is not deemed necessary to set it out, as the original bill and return, or answer thereto, together with the statement of facts heretofore given, present clearly the questions to be considered:

"Bill of Complaint.

"Filed Jan. 23, 1908.

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, FOURTH CIRCUIT, AT COLUMBIA.

"The Fleischmann Company, Complainant, *vs.* "W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, individually, Defendants.	In Equity.

"To the Honorable Judges of the Circuit Court of the United States for the District of South Carolina:

"The Fleischmann Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and a citizen of said State, brings this, its bill against W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of the State of South Carolina, and said defendants individually, all of whom are citizens and residents of said State of South Carolina, and, thereupon, your orator complains and says:

"I.

"That your orator, The Fleischmann Company, was, at all times hereinafter mentioned, and still is, a corporation, duly created, organized and existing, under and by virtue of the laws of the State of Ohio, and is a citizen and resident thereof, having its principal office in the City of Cincinnati, in said State, and that the defendant, W. J. Murray, is a citizen and resident of the State of South Carolina, residing at Columbia, in said State; the defendant John McSween, is a citizen and resident of said State of South Carolina, residing at Timmonsville, in said State; the defendant, B. F. Arthur, is a citizen and a resident of the State of South Carolina, residing at Union, in said State; that the defendant, C. K. Henderson, is a citizen and resident of the State of South Carolina, residing at Aiken, in said State; and the defendant, Avery Patton is a citizen and resident of the State of South Carolina, residing at Greenville in said State.

"II.

"And your orator further shows that many years prior to the passage of the act hereinafter mentioned, there was duly created and established by law, in the State of South Carolina, an institution for the purpose of buying, selling and distributing alcoholic liquors within said State, known as the State Dispensary, and that by the terms of the law creating and establishing said Dispensary, the managing agents or officers thereof were duly authorized, directed and empowered to purchase in its name and on its behalf, all kinds of spirituous, vinous and malt liquors, and to pledge the credit of the said State Dispensary for the payment of the same.

"III.

"And your orator further shows that the General Assembly of the State of South Carolina, at its session held in the year 1907, for the purpose of discontinuing said State Dispensary, disposing of its assets and paying off its creditors, passed an act entitled "An Act to Provide for the Disposition of all Property Connected with the State Dispensary and to Wind up its Affairs, which said act is in words and figures as follows:"

The bill here sets out in full the Act of the South Carolina Legislature of February 16, 1907, which is copied in the statement of facts hereinbefore.

"IV.

"That the said Act was duly approved on the 16th day of February, 1907, and within a short time thereafter the Commission therein provided for was created by the appointment of the defendants, as Commissioners, and said defendants, having duly qualified and organized pursuant to said Act, became, and do now constitute, the State Dispensary Commission, and as such are charged with the execution of all the powers conferred and the performance of all the duties imposed upon said Commission by the said Act.

"V.

"That, immediately upon their qualification and organization as hereinbefore alleged, the defendants entered upon the discharge of said duties, and in accordance with the directions contained in said Act, took possession and control of the entire business and property of the State Dispensary, and have, as your orator is informed and believes, sold said property and collected the debts due to said State Dispensary and the proceeds arising from said sale and collection are, or ought to be, in the hands of said defendants, applicable to the payment of the liabilities of said State Dispensary, and to the other uses and purposes designated in said Act.

"VI.

"And your orator further shows that, prior to the passage of the said Act of 1907, providing for a sale of the property of the said State Dispensary and the winding up of its affairs, and while the said State Dispensary was still engaged in business, your orator sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable whiskies and other spirituous liquors, all of which whiskies and liquors were received and accepted by said State Dispensary, and had been, except as hereinafter alleged, sold or disposed of by it at a substantial profit; that the sales so made

by your orator were, in every respect, regular and legal and were made upon orders properly and lawfully given by the persons duly authorized to give such orders; and the whiskies were delivered to said State Dispensary under a contract, promise and agreement that your orator should be paid the prices charged therefor, and the said State Dispensary became and was at the time of the passage of said Act, and at the time the defendants took charge of said business and property, and still is, justly indebted to your orator for the same.

"VII.

"That, within a short time after the appointment and qualification of the defendants and their organization as the State Dispensary Commission, your orator being desirous of having its account against the State Dispensary settled, and in order that all differences might be reconciled, or disputes, if any, adjusted, and the amount due to your orator fixed and determined, filed with said defendants an itemized statement of its account and requested the defendants to have the same audited so that it could be passed upon; that, thereafter, the defendants notified your orator that there was still on hand and undisposed of a portion of the whiskey which your orator had sold to the said State Dispensary and asked your orator to take back said whiskey and allow a credit therefor, then and there holding out as an inducement to your orator for so doing, that if they were permitted to return said goods, it would greatly facilitate a settlement with your orator and enable them to make a much earlier payment of the account, and your orator, being anxious to remove every possible cause of delay in obtaining a settlement of its claim, did take back all of said goods and give credit therefor at the invoice price thereof.

"VIII.

"That, on or about the 24th day of May, 1907, the defendants advised your orator that, in comparing its account with the books kept by the State Dispensary, they had discovered a discrepancy between the amount claimed by your orator and the amount shown by said books to be due, of $292.14, growing out of certain credits to which the said State Dispensary was entitled, and which your orator had failed to allow, but that, in

every other particular, your orator's account was, according to the audit made by the defendants, correct, and corresponded with the said books, and that if your orator would allow said credit there would be no further dispute as to the amount due to your orator, and your orator being still anxious to get its account adjusted and receive payment of the same, did consent that said sum might be deducted, and, thereupon, it was agreed between your orator and the defendants, that there was, on the date above mentioned, a balance of $66,501.19, justly due and owing to your orator by the said State Dispensary, which said sum the defendants then and there agreed to pay, but, notwithstanding your orator has made frequent demands on them, they have refused and still refuse to pay the same.

"IX.

"And your orator further shows that, as it is informed and believes, the defendants have received from the sale of the property of the State Dispensary and the collection of debts due it, and now have in their hands a large sum of money, amounting to upwards of $800,000.00, and that this sum, if properly preserved and applied, will be amply sufficient to pay off and discharge the claim of your orator and all other just liabilities of said State Dispensary, which said liabilities do not, as your orator is informed and believes, exceed the sum of $609,000.00, all of which facts will more fully appear from the report made by the defendants to the Governor of the State of South Carolina, on or about the 4th day of January, 1908, to which report reference is hereby made for the ascertainment of said amounts.

"X.

"That, as your orator is advised and believes, the money received by the defendants and held by them as hereinbefore alleged, having been placed in their possession for the specific purpose of paying all the just liabilities of the State Dispensary, became and now constitutes a trust found in the hands of said defendants, and the said defendants hold the same as trustees for your orator and the other creditors of the said State Dispensary, and the amount due your orator having been determined and agreed upon, your orator is entitled to have said amount immediately paid to it out of said fund.

"XI.

"And your orator further shows that said defendants are abusing the trusts reposed in them by wrongfully and unlawfully failing and refusing to carry out the terms and provisions of said Act of 1907 of the General Assembly of the State of South Carolina and that the greater part of the money which the defendants have received, as aforesaid, has been on deposit for many months, and is now on deposit in certain banks in the State of South Carolina, in which banks the said defendants, or some of them, are respectively interested, either as officers, stockholders or directors; that a large sum of said money is now in the National Loan & Exchange Bank of Columbia, in which bank the defendant Murray, who is the Chairman of the Dispensary Commission, is a large stockholder and a director; that another large portion of said money is deposited in the Bank of Timmonsville, in which said bank the defendant McSween is a stockholder and a director, and is also its president; that another large portion of said money is on deposit in the People's Bank of Union, in which bank the defendants Arthur is a stockholder and a director, and also its president; that another large portion of said money is on deposit in the Bank of Aiken, in which bank the defendant Henderson is a stockholder and director; that another portion of said money is deposited in the Piedmont Savings & Investment Co. of Greenville, in which the defendant Patton is a stockholder and director, and a portion of said money is deposited in the Merchants & Farmers Bank of Cheraw, in which bank one W. F. Stevenson, who resides in the said town of Cheraw, and who is the attorney for the defendants constituting the State Dispensary Commission, is a stockholder and director, and also its president.

"That the said defendants have wrongfully, unlawfully and fraudulently declined and refused to make distribution of the said money among the creditors of said State Dispensary or to pay the claim of your orator, or any of the other of said creditors, for the reason, as your orator verily believes and alleges the fact to be, that there has been formed and now exists an unlawful understanding or agreement between the defendants, by which it has been decided that the money deposited in the banks above named shall be held and allowed to remain as long as possible in said banks and be used by them for their own benefit and profit.

"XII.

"And your orator further shows that there are a large number of persons claiming to be creditors of the said State Dispensary and seeking to collect from the defendants various sums ranging in amount from one to many thousand dollars; that some of said persons, for the purpose of compelling the payment of their debts, have already brought suit against said defendants, and others are, as your orator is informed and believes, threatening to institute similar actions; and if the defendants shall be required or permitted to defend a multiplicity of such suits in order to determine the validity of each claim against them, and shall be allowed, as they have declared their intention to do, to defer the payment of all claims until the final termination of said suits, a large part of the funds in their hands will be wasted in expensive litigation and court costs, and a great wrong, injury and injustice will be done to your orator and the other creditors whose claims are admitted to be just and correct, and about which there is and can be no dispute.

"XIII.

"And your orator further shows that, although the said defendants have in their hands the large sum of money hereinbefore mentioned, and although they are wrongfully and unlawfully retaining said money for the use and benefit of institutions in which they are personally interested, and are wrongfully and unlawfully refusing to carry out and perform the duties and trusts imposed upon them by the General Assembly of the State of South Carolina, the said defendants have only given bonds in the sum of $10,000.00 each, and they are now, as your orator is informed and believes, threatening to take measures to have an act passed by the General Assembly of South Carolina terminating their Commission and providing for a transfer of the money in their hands to the State Treasurer, which money ought to be applied to the payment of the debts due to your orator and the other creditors of the said State Dispensary, and thus, if possible, place the same beyond the reach, or by some other means, impair the contract rights of your orator and said other creditors, and, as your orator is advised and believes, unless the defendants are restrained and enjoined from exercising any control over or in any way inter-

fering further with said fund, the said defendants will waste or wrongfully divert the same to the great and irreparable damage of your orator and all the other creditors of the State Dispensary.

"XIV.

"And your orator further shows, upon information and belief, that there is a very wide difference between the opinions of the defendants as to the duties required of them as members of the Dispensary Commission, and the proper manner of performing said duties; that the defendant B. F. Arthur, although still a member of said Commission has declined and refused to take any further part in the proceedings thereof, and has not, for at least eight months, attended any of the meetings of said Commission, or participated in any of its deliberations; that the other four defendants as members of said Commission are about equally divided as to what course ought to be pursued with reference to the ascertainment of the just liabilities of the State Dispensary and the payment of the same, and that, by reason of such division, the said defendants have become engaged in a dispute among themselves, which renders it almost impossible for them ever to agree upon any plan by which to carry out the provisions of the Act of 1907 of the General Assembly of South Carolina and to execute the trust imposed upon them by said Act, and, as your orator is advised and believes, unless this Honorable Court shall take charge of the trust fund now in the hands of the defendants as members of said Commission, and administer the same in accordance with the provisions of the said Act of 1907, your orator and the other creditors of said State Dispensary, will, to their great and irreparable damage, be indefinitely delayed in the collection of their claims.

"XV.

"And your orator further shows, upon information and belief, that the defendants now allege and pretend that there were certain irregularities and fraud in connection with some of the sales of liquors made to the former officers of the State Dispensary, and the defendants have entered into an unlawful combination or conspiracy with one J. Fraser Lyon, the present Attorney General of the State of South Carolina, and under whose advice said defendants are acting, to aid the said Lyon

in carrying out his frequent threats to prosecute and imprison said officers, and to that end, have agreed among themselves and with said Lyon to withhold the payment of the claim of your orator and all other creditors, until the said Lyon has obtained such evidence as may be sufficient to prove the guilt and secure the conviction of said officers; that under and pursuant to this agreement, combination or conspiracy the defendants have refused and are still refusing to carry out the provisions of the Act of 1907, and to pay the claim of your orator and the other just liabilities of said State Dispensary, although the account of your orator has been duly audited, the amount claimed admitted to be justly due and payable, as hereinbefore alleged, and notwithstanding the fact that the defendants have never made any pretense or claim that either of the sales made by your orator was, in any respect, irregular, illegal or fraudulent, and notwithstanding the frequent promises and agreements by the defendants to pay the amount so admitted to be due.

"XVI.

"And your orator further shows that, notwithstanding the fact that the amount claimed by your orator has been admitted by the defendants to be a just liability against the said State Dispensary, and now due and payable out of the fund in their hands and although the said defendants have never claimed or pretended that said amount was subject to any off-sets, credits or counter claims, your orator is ready, able and willing, if this Honorable Court shall direct that the amount due to it be immediately paid, to execute and deliver to the said defendants a good and sufficient bond in such sum as may be required by this Honorable Court, to the full amount of its claim, if necessary, conditioned to pay to the said defendants all such amounts as may be, upon the hearing of this cause, found and adjudged to be due by your orator to these defendants by way of off-sets, reduction, credit, counter-claim or otherwise.

"In consideration whereof, and for as much as your orator is without remedy and can obtain adequate relief only in a court of equity, and to the end that the defendants may be prevented from committing further wrongs and trespasses against the rights of your orator, and for the purpose of preserving the funds in the hands of the defendants and of enforcing the rights and equities of your orator in and to the same, and preventing

further waste, loss and damage, by reason of the facts alleged in this bill, your orator prays:

"(1) That this Honorable Court will either forthwith appoint a receiver to take charge of and administer as a trust fund all the money now in the hands of the defendants arising out of the sale of property belonging to the State Dispensary of South Carolina or from the collection of debts due it; or direct and decree that the amount admitted to be due to your orator be immediately paid to it upon the execution by your orator of a good and sufficient bond to be approved by the court and conditioned to pay to the defendants all such sum or sums as may be found to be due them by your orator and adjudged to be paid by it.

"(2) That the defendants, their agents, servants, attorneys and employes be restrained and enjoined from disposing of or paying out, or in any manner interfering further with said fund or any part thereof, except to transfer the same to the receiver appointed by the court, or to pay the amount due to your orator as the court may direct.

"(3) That it be referred to a master to ascertain and determine the amount due to your orator for goods sold and delivered by it to the said State Dispensary, and that a decree be entered ordering and directing that the amount so found to be due be immediately paid to your orator. That the defendants be required to set forth an account of all and every sum or sums of money received by them, or either of them, or which ought to have been received by them, or which has been received by any person or persons, by their or either of their orders, or for their or either of their use, from the sale of any property of the said State Dispensary or the collection of and debt or debts due to it, and when and from whom, and from what in particular, all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

"And that your orator have such other and further relief in the premises, as the nature of the circumstances of this case may require, and as to the court may seem meet and proper;

"And, may it please your Honors to grant unto your orator a writ of injunction, conformable to the prayer of this bill,

and also a writ of subpœna directed to the said defendants, commanding them, and each of them, to appear and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and to stand to, perform and abide by such orders, directions and decrees in the premises as to the court shall seem meet or be required by the principles of equity and good conscience.

"Return of Defendants.

"Filed January 29th, 1908.

"In the Circuit Court of the United States for the District of South Carolina.

"The Fleischmann Company, Complainants, vs. "W. J. Murray et al., constituting the State Dispensary Commission of South Carolina, and W. J. Murray et al., individually, Defendants.	In Equity.

"Come now W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, constituting the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, and without submitting themselves to the jurisdiction of this Honorable Court, but, on, the contrary, insisting that it is without jurisdiction in the premises, and reserving the right to demur, plead or answer in accordance with the rules of practice and procedure which obtain in this court, and solely in response, and by way of a return to the rule to show cause granted on the 21st day of January, 1908, 'why the relief prayed for in the said bill should not be granted and why a receiver should not be appointed by this court to take charge of and administer all of the funds now in the hands of said defendants arising from the sale of property belonging to the State Dispensary or from the collection of any debts due it,' and for cause in this behalf these defendants say:

"1.

"That the said plaintiff has not by and in said bill stated such a cause as doth or ought to entitle it to any such relief as

is thereby sought or prayed for from or against these defendants, or either of them.

"2.

"That it appears from the allegations contained in the complainant's bill that the said suit is a suit, in fact and in legal effect, against the State of South Carolina and not against these defendants or either of them, except as in their official capacity they represent said State, and therefore is contrary to the provisions of the eleventh amendment to the Constitution of the United States of America.

"3.

"That it appears from the allegations in said bill that the said suit is a suit against the State of South Carolina for that the purpose and intention thereof is to administer the funds and moneys belonging to the State of South Carolina and in the custody of its duly authorized agents; to coerce the State of South Carolina in the payment of the alleged debt of the plaintiff; and to restrain a duly constituted court of the State in violation of section 720 of the revised statutes.

"4.

"These defendants deny the allegations in paragraph 2 of the bill of complaint and they aver that 'The manufacture, sale, barter and exchange of intoxicating liquors was prohibited, and the State of South Carolina in the exercise of her police power engaged in and monopolized the liquor traffic, and to that end appointed and established the State Dispensary and appropriated $50,000.00, for commencing said business.

"Said Dispensary, however, had no existence or entity or credit separate and apart from the said State. It was a mere agency of the State for the conduct and operation of her business. The business belonged to the State. All purchases therefor were made by the State and upon her credit. All profits of the business and the stock on hand at the time the State Dispensary was abolished, belonged to the State.

"5.

"Under the Act creating the State Dispensary Commission and in the exercise of the powers, rights and the duties

conferred upon said Commission and these defendants by said Act, and by the Act approved January 24th, 1906, these defendants closed out the entire business and property of the State Dispensary, except real estate, and collected a large part of the debts, and thus the fund in controversy was realized.

"6.

"These defendants deny the averments contained in paragraph 10 of the bill of compliant and say that said funds are not trust funds, and that these defendants do not hold or control the same, as trustees, either for the complainant or other alleged creditors of the State, or for any one else. They aver that said funds are in their custody or control as officers of the State and at the will of the State, and are to be disposed of in accordance with the provisions of the Act creating the Commission, unless said Act is amended or repealed. They further aver that the said funds are the property of the State of South Carolina and are in the possession of the said State, as the control or possession of the said funds are in the defendants as the officers of the State, and their possession or control is the possession or control of the State.

"7.

"They further aver that they, as individuals, have no interest whatever in the litigation or in the funds in controversy, and that their sole duty and liability with respect to said funds, is to the State of Souh Carolina, to her General Assembly and Governor. That the claim of the plaintiff and all others for goods sold to the State Dispensary are against the State, and not against the State Dispensary or against the State Dispensary Commission, or against these defendants, either in their official or individual capacity. Neither the State Dispensary Commission, or these defendants, as officers or individuals, sustain any relation or privity to the plaintiff, contractural or otherwise. They owe no duty to, and are under no liability to the plaintiff or to any other person holding claims of like character against the State.

"8.

"These defendants further say that they have exercised the powers and authority granted by the General Assembly only

for the purpose of enabling them to perform their duties fairly and promptly, and they submit that they have proceeded with the work with all possible expedition and dispatch.

"They requested the Attorney General and his associates to investigate and secure evidence as to the validity and justice of the various claims against the State. From time to time they impressed upon said parties their desire to complete the work as soon as possible, and repeatedly urged the necessity of prompt action. It was not until within the last thirty days, however, that said parties reported that they had secured sufficient evidence, and were ready to proceed with the hearing of all said claims.

"These defendants say upon information and belief that this report was made as early as practicable, as there was a large number of claims extending over a period of several years, and the evidence relative to the same was gathered from various States.

"Immediately upon receipt of this report, the commission assigned 41 of said claims for a hearing, and among these was plaintiff's claim. A docket was made up, copy of which will be shown to the court, and a notice was served upon the plaintiff and upon all others whose claims had been assigned for a hearing as stated. A formal notice was served upon the plaintiff, requiring it to produce certain of its books of original entry relating to its accounts against the State.

"9.

"On the 14th day of January, the Commission commenced the hearing of said claims. It took up the claims of Ullman & Co. and of the Anchor Distilling Company. After hearing of evidence the Commission reached the conclusion that instead of the State being indebted to said claimant in the sum of $36,926.78, that Ullman & Co. was indebted to the State in the sum of $31,390.72, and thereupon they returned a judgment in favor of the State against Ullman & Co. in accordance with their findings. A transcript of the evidence in said case, and the copy of the judgment of the Commission will be exhibited to the court.

"10.

"Plaintiff's claim was assigned for January 23rd. George B. Lester, Esq., general counsel for plaintiff was present on

January 14th and claimed an agreement with Mr. Stevenson that plaintiff's case would be heard that day. Before announcing ready to proceed, the counsel for the State demanded the production of the books covered by the notice served upon the plaintiff as aforesaid, and notified Mr. Lester that they desired the presence of one Early who acted for the plaintiff in connection with sales to the State and whom they desired to examine in connection with its claim. Thereupon the said George B. Lester stated that the plaintiff would decline to produce its books or have said Early present. He challenged the jurisdiction of the Commission to enter upon a full investigation of all transactions between the plaintiff and the officials of the State Dispensary, and stated that he would appeal to the Federal Court for relief.

"11.

"The Commission is advised by the Attorney General and his associates that the claim of the plaintiff for goods sold by it to the State Dispensary is unjust and invalid and they have evidence to establish (a) That the plaintiff and the Gerson-Seligman Company are one and the same, as the latter is a mere trade name under which the former transacted business and was used for the purpose of avoiding the provision of the statute which prohibits any person, firm or corporation from submitting more than one bid.

"(b) That there existed between the plaintiff and Gerson-Seligman Company and its agents and representatives and a majority of the said members of the Board of the South Carolina Dispensary a conspiracy to defraud and cheat the State of South Carolina and in pursuance thereof, the said plaintiff by and with the aid and assistance of the said Board of Directors, or a majority thereof, did cheat and defraud said State of South Carolina by charging and collecting from said State prices for the goods sold to the State which were largely in excess of the market value thereof, which overcharges were by agreement between conspirators made and used for the purpose of corrupting and bribing the officials and agents of said State of South Carolina to the end that the Board of Directors of the Dispensary might be induced to purchase the goods of said plaintiff at such excess prices and the difference between the fair market value of the goods so sold by said plaintiff to the said

State and the prices at which said goods were so purchased from the plaintiff was fraudulently, and unlawfully employed by the plaintiff in bribing and corrupting the officials and agents of the said State, so that said State was cheated and defrauded out of a large sum of money in excess of the amount now claimed to be due by the plaintiff.

"(c) That the plaintiff did not comply with the law of the State of South Carolina relative to the sale and purchase by the State Board of Directors in that they failed to comply with the provisions of said law requiring that only one bid shall be made by any one for said plaintiff and the said Gerson-Seligman Company, being in fact one and the same firm, did fraudulently and deceitfully pretend that they were separate firms and did frequently make two or more bids at the same time to the Treasurer of said State for consideration by the State Board of Directors of the South Carolina Dispensary.

"(d) They failed to accompany their bids, or all of them, with the chemical analysis of the liquor offered for same.

"(e) They failed to furnish the bonds required by law to insure the compliance by them with the terms of the contract of purchase and sale between them and the State Dispensary.

"(f) That they violated said law in that they constantly had agents, representatives and solicitors in the State for the purpose of soliciting the purchase of their goods by said State, and that through its said agents and representatives soliciting business from said Board of Directors.

"(g) That the gross amount of sales made by the plaintiff and by said Gerson-Seligman Company to the State amounted in the aggregate to several hundred thousand dollars, and that in each of the said bills there were prices charged in pursuance of said conspiracy in excess of said fair market value.

"(h) That the plaintiff sold to the State the same brand of liquors of a lower proof, at a price higher than it sold the same brand of goods of a higher proof to other parties.

"(i) That the plaintiff sold to the State as whiskey an artificial whiskey or concoction made of spirits with a trace of whiskey added to it.

"(j) That in pursuance of said conspiracy the advertisements for bids were illegal in that the prices of the liquors to be furnished were fixed in the advertisements and thus competition was prevented.

"(k) That upon a just accounting between the State and the plaintiff, the plaintiff will be indebted to the State in a considerable amount.

"12.

"From the evidence already before the Commission, it is satisfied of the existence of a conspiracy to which some of the creditors and some of the Board of Directors were parties, but whether the plaintiff was a party thereto and whether its claims is valid or invalid, and whether it should be paid in whole or in part, are matters to be determined, as these defendants are advised after the Commission has heard the evidence of both plaintiff and the State.

"13.

"These defendants deny each and every allegation in the bill of complaint to the effect that these defendants had stated "That there would be no further dispute as to the amount due" plaintiff, or that these defendants had admitted that there was due the plaintiff a balance of $66,501.19, or any other amount, or that they had agreed to pay plaintiff any amount whatever, or that 'the amount due (plaintiff) had been determined and agreed upon,' or 'that the amount claimed by (plaintiff) has been admitted by the defendants to be a just lability against the State Dispensary and now due and payable out of the fund in their hands,' or that 'the said defendants have never claimed or pretended that said amount was subject to any off-sets, credits or counter-claims.' Each and every of said averments are untrue.

"14.

"Defendants deny the averment in said bill of complaint to the effect that plaintiff's account has been 'adjusted,' except to the extent that the books of the State Dispensary have been audited and the entries thereon have been brought into sub-

stantial agreement with the items of plaintiff's claim. There has been no determination or adjustment as to whether the items on said claim are proper and just charges against the State, nor whether the said claim is to be reduced in whole or in part by reason of off-sets and counter-claims, nor whether said claim or any part thereof is illegel by reason of a non-compliance with the statutes of South Carolina, or by reason of frauds and conspiracies to which the claimant was a party, and in short for any of the reasons which the Attorney General and his associates contend they can establish by the evidence to which reference has been made. Moreover, defendants are advised that until final judgment all tentative conclusions or decisions however solemnly announced were subject to modification or reversal.

"15.

"These defendants denounce as gratuitously false the charges in said bill of complaint 'that there has been formed and now exists an unlawful understanding or agreement between the defendants by which it has been decided that the money deposited in the banks above named shall be held and allowed to remain as long as possible in said banks, to be used by them for their own benefit and profit,' and that the defendants 'are wrongfully and unlawfully retaining said money for the use and benefit of the institution in which they are personally interested and are wrongfully and unlawfully refusing to carry out and perform the duties in trust imposed upon them.'

"The defendants aver that they deposited the funds received by them in thirty-one banks in the State of South Carolina, in which there is now on deposit to the credit of the State Dispensary Commission the aggregate sum of $706,599.82 on call and subject to check; that each and every of the said banks is sound and of undoubted solvency; that each and every of said deposits, with the exception of $16,505.59 on deposit with the National Loan & Exchange Bank as an active account draw interest from the date the deposits were respectively made at four per cent. per annum and are secured by State and municipal bonds and other solvent securities deposited by said banks with said Commission as collateral security for the payment of principal and interest of said respective deposits, the market value of which is largely in excess of the deposits secured thereby.

"The defendants will exhibit to the court a list of the said banks with the amount deposited in each.

"16.

"That in addition to said amounts deposited and secured as aforesaid, the Commission will hereafter receive about $100,000.00 on account debts due by various County Dispensaries, which when received will in like manner be deposited and secured.

"17.

"The defendants admit that some of them are stockholders and directors in some of the banks named, but they submit that each of the said banks was selected solely because of its recognized solvency and their willingness to secure the deposits with sufficient and satisfactory collaterals and to pay four per cent. interest thereon.

"18.

"The Commission offered $150,000.00 to the Carolina National Bank and the Bank of Columbia, both of which refused to collaterally secure the deposit, and for that reason the deposits were not made with them.

"The defendants are informed and believe that they could not have found banks, either in or out of the State of South Carolina, in which to deposit said fund which would have received said deposits on safer or more favorable terms.

"19.

"The defendants deny the allegations in paragraph 14, and aver that there is no difference between the members of the Commission as to the method to be pursued in dealing with the creditors of the State for goods sold to the State Dispensary, and that the Commission as a body is a unit on the following propositions, to-wit: (1) To require all creditors whose claims are challenged by the counsel for the State to produce their books of original entry and their documents containing material evidence and to comply with all reasonable and proper requirements prescribed by the Commission. (2) To hear all competent evidence presented by the creditors or by counsel for

the State, and after a careful and judicial consideration thereof, to determine what amounts are due by the State, and pay all claims which in their honest and impartial judgment are due by the State, and no others.

"20.

"The defendants deny that it has been eight months since Commissioner Arthur has met with the Commission. It is true that he has not attended the meetings of said Commission since November. His physician wrote the Commission that Mr. Arthur's absence from one or more of the meetings was because of his illness.

"21.

"These defendants deny the allegations contained in paragraph 15 of the bill of complaint, and they denounce as gratuitously false and malicious the allegations in said paragraph, that 'the defendants have entered into an unlawful combination or conspiracy with one J. Fraser Lyon, the present Attorney-General of the State of South Carolina, and under whose advice said defendants are acting to aid the said Lyon in carrying out his frequent threats to prosecute and imprison said officers and to that end have agreed among themselves and with said Lyon to withhold the payment of the claim of your orator and all other creditors until the said Lyon has obtained such evidence as may be sufficient to prove the guilt and secure the conviction of said officers; that under and pursuant to this agreement, combination or conspiracy, the defendants have refused and are still refusing to carry out the provisions of the Act of 1907.' The defendants aver that they withheld payment until the State could have an opportunity to collect the evidence with regard to said claims, and after a regular and orderly hearing, the Commission could reach a fair decision as to the validity and justice of the various claims.

"21.

"It is further averred that after the hearing of the case of Ullman & Co. on the 15th day of January, 1908, the Commission and the Counsel for the State were then and there ready to hear and determine the other cases assigned in their regular

order, but said cases were not heard because of the absence of some of the claimants and because of the failure of others to comply with the reasonable orders of the Commission. Thereupon the Commission assigned all of the remaining cases for hearing to be commenced on January 30th, and to continue from day to day until all of said cases have been finally disposed of. It is the purpose of said Commission to hear and decide the cases in their order, upon the calendar, and notices to this effect were sent the various claimants by registered mail, and unless prevented by the orders of this Honorable Court, the Commissioners will execute said purpose and will pay each and every claim which shall be determined to be due and owing by the State.

"22.

"It is further averred that the State is the owner of said funds and should be sole defendant, at least the State is an indispensable and necessary party.

"Defendants are advised that the State is not subject to suit and cannot be the sole defendant, or the defendant at all, and that therefore the court is without jurisdiction, but they submit that if it had jurisdiction there is no necessity for the appointment of a Receiver. The State authorized the Commission to act in the premises and these defendants have undertaken to discharge their duties fairly, promptly and conscientiously. They submit that all the allegations and insinuations made in the bill of complaint charging neglect, delay, or improper or fraudulent conduct on the part of these defendants are unfounded and false, and they submit that they should be permitted to complete the work and discharge the responsibilities imposed upon them by the State.

"23.

"These defendants demand strict proof of each and every allegation in the bill of complaint contained, except those herein specifically admitted to be true.

"24.

"The defendants submit herewith a number of affidavits and they pray that the same may be taken in connection with

and as a part of their return, and having fully answered they pray to be hence discharged with their reasonable costs in this behalf expended."

Upon the filing of the bill an order was issued by the Circuit Court of the United States for the District of South Carolina, requiring the respondents, to-wit: the five Dispensary commissioners heretofore named to appear and show cause why a receiver should not be appointed and an injunction granted as prayed for by the complainants. On the return and answer of the said commissioners, and after a hearing, receivers were named by the Circuit Court to take charge of the fund in the hands of the respondents and an injunction was also granted restraining said respondents from disposing of the funds in their hands, etc. From these decrees and orders, which were made in vacation, the respondents appealed to this court.

The positions relied upon chiefly by the appellants are that the Circuit Court is without jurisdiction in this case and the basis of the position is that the suit is one against the State of South Carolina, and is prohibited by the Eleventh Amendment; that the Dispensary was a State institution and its operation part and parcel of the exercise of independent power by a Sovereign State; that the present commissioners are officers of the State, and that the fund in their hands belongs to the State and, therefore, the State is not only a necessary, but an indispensable, party to any suit or judicial proceeding seeking the fund or any part of it; that the Dispensary Commission is a court of the State of South Carolina and that the Circuit Court is forbidden by law to enjoin its proceedings, and further, that the equities alleged in the bill are not sufficient to authorize an injunction and the appointment of receivers, as prayed for.

On the other hand the appellees insist that the commissioners (appellants) are mere ministerial agents appointed under the provisions of the Act of the South Carolina Legislature to dispose of the Dispensary property, collect the debts due and from the funds thus arising to first pay off and discharge the just liabilities incurred in the operation of the Dispensary, in the purchase of supplies, etc., and the residue, if any, to pay to the State; that the fund in the hands of the appellants was there, by virtue of the law, for special purposes, the first of which was to pay the Dispensary debts, and that the State has no interest save in the residue, if there be such, after

the just debts are paid. In other words, the position principally maintained by the appellees is that the appellants, as commissioners acting under the authority of the Act of the South Carolina Legislature, became and are trustees of a special fund, which they hold primarily for the specific purpose of paying the debts which had been incurred by the Dispensary in the course of its operations; that the action of the appellants in refusing to adjust and pay the claims of the appellees was an abuse of trust, and was an arbitrary and illegal attempt to defeat complainants of their rights.

The appellees say, therefore, that they sought relief in a court of equity, there being, under the circumstances, no adequate remedy at law, whereby they might have the just and true amounts of their claims ascertained and have the funds in the hands of the appellants applied in payment, as contemplated by the provisions of the law which created the commissioners and from which they derived their power to act.

Boyd, District Judge:

When we have cleared away the immaterial matter and have divested this controversy of all save that which relates to the substance of it, there remains to be considered two main propositions; the first is jurisdictional and presents the question whether this action is against the State of South Carolina, and, therefore, forbidden by the Eleventh Amendment to the Constitution of the United States; the second, whether the Dispensary Commission, against the several members of which this suit is brought, is a court of the State of South Carolina and, therefore, incapable of having its proceedings stayed by writ of injunction granted by a court of the United States (Section 720, Revised Statutes). To these two may be added another which relates particularly to the bill and the testimony offered by the complainant in support; the appellants having set up, as a part of their answer, that the bill and the testimony are insufficient to authorize an injunction and the appointment of receivers *pendente lite*. The principles involved in the first proposition, however, are paramount, and following closely, as affecting the right of the complainant to maintain this action and the jurisdiction of the court to entertain it, is the second proposition.

Is this a suit against the State of South Carolina, or is the purpose of the action and the disposition sought to be made

of the subject matter of such nature as to render the State an indispensable party? In other words, does the State hold the money which the complainant undertakes to subject to the payment of his debt in its sovereign capacity, as a part of its public fund for its use in supporting and carrying on the State Government? Undoubtedly the Eleventh Amendment was intended to prevent a Federal Court, in suits prosecuted by citizens of another State or citizens or subjects of a foreign State, from interfering with a State in the preservation of its autonomy, in maintaining its own system of self-government, so long as such system is in harmony with the Constitution of the United States. To this end, therefore, the funds of the State, in its Treasury, or held by its officers or agents, for use in the administration of the governmental affairs of the State, are not to be affected by the process of a Federal Court, nor can such court entertain jurisdiction of an action which has for its purpose the invasion of the right of the State to manage and control its internal affairs, or of an action which will obstruct the State authority or impair the State instrumentalities in the discharge of legitimate functions in the maintenance of the State's integrity. To be more concise, the constitutional inhibition is to the effect that the courts of the United States cannot entertain jurisdiction in an action at the instance of a citizen which seeks to recover as against the State the property belonging to the State, or the purpose of which is, and the result of which would be, to disturb the legal and orderly administration of the State's internal governmental affairs by its duly appointed officers and agents.

Does this case come within the limits prescribed? In this connection it becomes necessary to enquire if the State has any present interest in the fund in controversy which can be divested by a judicial determination of the true amount, if any, justly due the complainant. Or has the State by an Act of the Legislature relinquished all right, if any existed, to enough of the fund to pay all the just debts contracted by the Dispensary authorities? If so, can the ascertainment of the true amount of these debts and the application of the funds in the hands of the commissioners in payment affect the right of the State or in any way interfere with the authority of the State to manage and control its internal government within the bounds of its legitimate autonomy?

The first proposition presented to us rests largely upon the construction to be given to the Act of the South Carolina

Legislature, approved February 16, 1907. This act provides that "the Governor shall appoint a commission of well-known business men of five members * * * to be known as the State Dispensary Commission."

"Said commission shall immediately organize by the election of a chairman and a secretary from their number."

"It shall be the duty of said commission to close out the entire business and property of the State Dispensary, except real estate, including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and *by paying from the proceeds thereof all just liabilities at the earliest date practicable.*"

By section 47 of another act passed by the South Carolina Legislature on the 16th of February, 1907, the Dispensary as a State institution was abolished, the enactment to that end being as follows:

"The State Dispensary is hereby abolished and all acts or parts of acts inconsistent with this act are hereby repealed."

Then came the other act of February 16, 1907, creating the Commission and from which we have quoted above. This act bears the title: "An Act to Provide for the Disposition of all Property Connected With the State Dispensary and to Wind up its Affairs." Thus we see that the State determined to go out of the business of dealing in liquors and through its Legislature repealed the law under which it had operated and by another act assigned all of the property, estate and effects belonging to or connected with the Dispensary to the Dispensary Commission to be reduced to cash and from the proceeds first to pay all *just liabilities.* From this source the fund now in the hands of the Commission arose. The State, through its Legislature, has passed both the title and possession of the fund involved to the Commission for the purposes designated in the act, the first of which is to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations. The fund being in the hands of the Commission charged with this duty the State has no interest in so much thereof as is necessary to pay the just debts. Then how can it infringe any right of the State to have the true amount of the debts due by the defunct dispensary judicially ascertained?

In *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheaton (22 U. S.), 904, which was a suit brought in the

Circuit Court of the United States, the question of jurisdiction, in view of the Eleventh Amendment to the Constitution, is discussed. The action was founded on promissory notes payable to a person named therein and were duly transferred, assigned and delivered to the plaintiff. A plea was entered by the defendant to the jurisdiction of the court on the ground that it was a corporation in which the State of Georgia and certain individuals who were citizens of the same State were stockholders, and the point made by the defendant was that the State of Georgia being a stockholder the action was forbidden by the Eleventh Amendment. In delivering the opinion Chief Justice Marshall uses this language:

"This suit is not to be sustained because the Planters' Bank is suable in the Federal courts, but because the plaintiff has a right to sue any defendant in that court who is not withdrawn from its jurisdiction by the Constitution or by law. The suit is against a corporation and the judgment is to be satisfied by the property of the corporation, and not by that of the individual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it. *It is, we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen.* Instead of communicating to the company its privileges and prerogatives, it descends to the level of those with whom it associates itself and takes the character which belongs to its associates and to the business which is to be transacted."

In the case of *Governor of Georgia* v. *Madrazo*, 1 Peters (26 U. S.), 110, in the course of an opinion delivered by Chief Justice Marshall, it is said:

"In *United States* v. *Peters*, the court laid down the principle that although the claims of a State may be ultimately affected by the decision of a cause, yet if the State be not necessarily a defendant the courts of the United States are bound to exercise jurisdiction."

In the case of *Pennoyer* v. *McConnaughy*, reported in the 140 U. S., page 1, very clearly drawn is the distinction in suits

brought against officers or agents of a State as to when the jurisdiction of the Circuit Courts of the United States may be maintained, and when such jurisdiction cannot. In the course of the opinion in this case the court, speaking through Mr. Justice Lamar, says:

"The first class is where the suit is brought against the officers of the State as representing the State's action and liability thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract."

Suits within this class are forbidden. The court further says:

"The other class is where the suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconstitutional statute, committed acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State or for compensation in damages, or in a proper case where the remedy at law is inadequate for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State."

Suits within this class are not forbidden.

In the case of *Swasey* v. *N. C. Railroad Company*, 23 Fed. Cases, page 518, the State of North Carolina had issued bonds for the construction of the North Carolina Railroad. The State took stock in the North Carolina Railroad Company to the amount of the construction bonds so issued. The act under which the bonds were issued pledged the stock which the State held in the company for the payment of the bonds. The bondholders brought a suit in the Circuit Court of the United States for the District of North Carolina, seeking to subject the stock to the payment of overdue bonds and also accumulated interest. It was contended that the State of North Carolina was an indispensable party to this suit on account of its interest in the result and that, therefore, the suit was forbidden by the Eleventh Amendment, but the court said:

"If a State could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of *Osborne* v. *Bank*, 9 Wheaton, 739, it has been the uniform practice of the courts of the United States to take jurisdiction of cases affecting the property of a State in the hands of its agents without making the State a party, when the property or the agent is within the jurisdiction; in such case the court acts through the instrumentality of the property or the agent."

Another case following in the same line is that of *Chaffraix* v. *Board of Liquidation, et als.*, 11 Federal Reporter, 638, in which it is held that:

"The Circuit Court has jurisdiction to prevent by injunction the officers of a State from diverting a fund collected by taxation and set apart under a statute of that State to pay certain bonded indebtedness of said State, to the end that said fund may be preserved intact until the rights of the parties and interests of the State, if any she has, may be determined contradictorily. Such action is not forbidden by the Eleventh Amendment to the Constitution of the United States, and is necessary for the proper enforcement of Section 10 of Article 1 of the same instrument."

In the case of *Tindal* v. *Wesley*, reported in the 167 U. S., page 204, the Supreme Court further emphasizes the distinction we are discussing. That was a suit by citizens of New York against citizens of South Carolina to recover the possession of certain real property in the latter State, with damages for withholding possession. One of the defendants in his answer stated that he had no personal interest in the property, but as Secretary of State of South Carolina had custody of it and was in possession only in that capacity. The other defendant stated that he was watching, guarding and taking care of the property under employment by his co-defendant. Both defendants disclaimed any personal interest in the property and averred that the title and right of possession was in the State. It was held in that case, Mr. Justice Harlan delivering the opinion of the court, "that the suit was not one against the State within the meaning of the Eleventh Amendment to the Constitution of the United States." And it was held fur-

ther "that a suit against individuals to recover the possession of real property is not a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf. *The Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of citizens without authority of law," etc.*

Further in this decision the court says:

"Of course it was competent for the defendants to prove that the lots in question belonged to the State and in that way defeat the present action. So it would have been competent for the State, if it claimed the property, to have intervened and submitted to the jurisdiction of the court to have obtained a judicial determination of the claim asserted for it by the defendants. But it did not intervene; it refused to do so."

The court goes still further and refers to the case of *South Carolina* v. *Wesley*, 155 U. S., 542, stating:

"It appears that the State, by its Attorney-General, suggested to the court that these lands were held, occupied and possessed by the State through and by its officer and agent and were used for public purpose; and without submitting the rights of the State to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, it moved that the proceedings be dismissed. That motion was overruled and the writ of error sued out by the State was dismissed, the Chief Justice observing: 'The State does not complain that it was refused leave to intervene, but that the Circuit Court, without the intervention of the State, refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The State was not a party to the record in the Circuit Court and did not become a party by intervention *pro inter esse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court'." (*U. S.* v. *Lee*, 106 U. S., 196, and *Georgia* v. *Jesup*, 106 U. S., 458, are also cited.)

It will be found that the doctrine declared in the several cases, as above recited, is reiterated in the case of *Gunter, Attorney-General, Etc.*, v. *Atlantic Coast Line*, 200 U. S., 273.

But we deem it unnecessary to cite further authorities upon the position we are presenting, for upon examination of the cases we have mentioned it will be found that other cases bearing upon the point are referred to. We will, however, call attention to the most recent case involving the principle, and that is in the matter of Edward T. Young, petitioner on petition for writ of habeas corpus and certiorari, decided during the last term of the Supreme Court. This case arose in the State of Minnesota and was a suit in equity brought by a certain railway company to restrain the Attorney-General and other officers of the State from enforcing a law which had been passed by the Minnesota legislature imposing penalties upon railroad corporations and officers of such corporations for violating freight rates provided under the State law. The Attorney-General of the State of Minnesota, who is the petitioner in the case, relied upon the position that the proceeding by the railroad was a suit against the State and forbidden by the Eleventh Amendment. The Supreme Court, Mr. Justice Peckham delivering the opinion, held that as the act of the legislature in question was unconstitutional, the Attorney-General and other officers of the State who undertook to enforce it to the injury of the railroad were not protected by the Eleventh Amendment; that the suit was not one against the State, but against the Attorney-General and other officers named, to restrain them from enforcing an unconstitutional act of the legislature.

In what capacity, therefore, are the members of the Commission acting? Are they officers of the State of South Carolina, discharging a duty in behalf of the State, or are they agents appointed under the act of the legislature of the State, empowered to take possession of a certain fund and directed to administer such fund in a particular manner? In other words, does the act creating the Commission and authorizing the appointment of the several members who compose it confer upon them any powers in connection with the administration of the State's affairs, or are they, by the terms of the act, holders of a special fund intrusted to them for the prime purpose of paying off and discharging the State Dispensary debts? We are constrained to hold that the fund in their hands is, by virtue of the provisions of the act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the fund in the hands of the Com-

mission, to the extent that the debts are shown to be just, and that a judicial determination of the true amount of such debts can, in no way, affect the rights or interests of the State, the only interest of the State in the fund being, as declared by the act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities. It is elementary that particular formality is not required in the creation of a trust. Any agreement or contract in writing, executed by one having the power to dispose of property, whereby it is directed that particular property or fund shall be held or dealt with for a special purpose for the benefit of another, in such case equity raises a trust in favor of the benificiary. The right to create a trust for specific purposes is not confined to individuals or private parties, but we find in Perry on Trusts, Sec. 30, "that a State, by its legislation, or by its public officers, duly authorized, can create a trust, convey property and appoint trustees." The provisions of the act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors. There are the necessary three parties, the trustor, the trustees, and the *cestui que trusts*. The State, acting through the legislature, passes the title and possession of certain property, to the five appellants who are constituted a Dispensary Commission. The direction is that the appellants take this property, sell it, collect debts and, when the proceeds are in hand, pay off the just liabilities of the State Dispensary. The act then provides for the payment of certain expenses incident to the discharge of the duties devolving upon the Commission, and after that, the residue to be paid to the State. We undertake to say that there is scarcely to be found recorded anywhere an assignment by a debtor for the benefit of creditors more intelligently constructed or more readily understood. Having, therefore, determined the relation of the appellants to the fund in controversy, we answer the question propounded in the outset that THIS IS NOT A SUIT AGAINST THE STATE and THAT COMPLAINANT IS NOT FORBIDDEN TO MAINTAIN HIS ACTION BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The appellants are in possession of the fund which complainant is seeking to recover on the ground that it has been set apart and placed in the hands of the appellants to pay a debt which is justly due him. The State of South Carolina does not in-

tervene to assert any right to this fund or to have any interest which the State may have in it determined, but the appellants themselves raise the question of the jurisdiction of the court, basing it upon the allegation that the property in their hands belongs to the State. We think, in view of the facts in this case, upon the authorities heretofore cited, and especially under the case of *Tyndal* v. *Wesley, supra,* the appellants are not entitled to avail themselves of that defence.

This suit is not against the State, nor is the State an indispensable party. Treating the fund in the hands of the appellants as a trust fund, and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties. However, if the State elects, it may intervene and have a judicial determination as to any right it may claim. To conclude, therefore, as to the first proposition, it is our opinion that the Circuit Court has jurisdiction of this case and that the same is cognizable in a court of equity. It is the peculiar province of courts of equity to administer trusts. Indeed, it is a familiar saying that "equity loves a trust," and that it will not permit a trust to fail for the want of a trustee.

In a court of equity, which is a forum of conscience, the short-comings of the law can be supplied and every interest and right can be protected and administered so as to insure exact justice.

The proceedings in these courts are of such character as to be most conducive to the ascertainment of truth, and besides this, a chancellor may, if he deems it expedient, be aided in determining, a difficult issue of fact by calling to his assistance a jury on the law side of the docket.

It is insisted that the claims involved in this controversy, if due, are debts of the State, and appellants say that they represent the State, which is the real party in interest; yet, in this situation, they contend that in case of a dispute as to the validity of any of the claims it should be left to them to decide. In other words, their position appears to be that the agents and representatives of the debtor should constitute a tribunal, absolute in its character, to arbitrarily pass upon what, if anything, is due an alleged creditor, and if a claim be adjudged invalid to put an end to it without further opportunity for redress on the part of the creditor. To uphold such contention

would, in our opinion, in the event that a just debt due a creditor was thus rejected, deprive such creditor of his property without due process of law.

This case presents itself in another aspect which, to say the least, is somewhat novel and which, if other attending conditions were different, might affect the right of the State to avail itself of the provisions of the Eleventh Amendment. We feel justified in assuming that in the conception and adoption of the Eleventh Amendment it never entered the mind that a sovereign State would engage in business as a liquor dealer and become a trader by buying and selling an article of common traffic in competition with the citizens of the country. It may be questioned, therefore, whether the State of South Carolina, in becoming such dealer, was exercising a governmental prerogative or performing a function necessarily or properly incident to its autonomy as a State. It is not our purpose to venture an opinion in respect to this question, for in view of what we have said before, it is not necessary to the disposition of the case, and then, we have no authority in point to guide us. We will, however, recall, as having some bearing on the question, the following quotation from *Bank of United States* v. *Planters' Bank of Georgia, supra*:

"It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen."

And we may also refer to *South Carolina* v. *United States*, 199 U. S., 437. In this case the Supreme Court passed upon the right of the United States Government to require the South Carolina dispensaries to pay the privilege tax as liquor dealers. The contention was there, as here, that the Dispensary was a State institution, and, therefore, not subject to tax by the Federal government. Mr. Justice Brewer, after citing a number of cases, in the course of the opinion which he delivered for the court, uses this language:

"These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental

character and does not extend to those which are used by the State in the carrying on of an ordinary private business."

These declarations by the highest court of the Nation will at once suggest the inquiry, if the Dispensary was not an instrumentality of the State's government in one respect, can it be such in any other?

The second proposition is whether the State Dispensary Commission, provided for in the act of February 16, 1907, is a court of the State of South Carolina, and, therefore, cannot be enjoined because of the provisions of Section 720 of the Revised Statutes of the United States. We scarcely deem it necessary to enter into an elaborate discussion of this question, for what is said by us before practically disposes of it. However, a perusal of the act creating the Commission will at once repel the argument that it is, in any sense, a court. The constitution of South Carolina provides for courts as follows: First, a court for the trial of impeachments; second, a Supreme Court; third, a court of common pleas and general sessions; fourth, a probate court; fifth, courts of magistrates; and sixth, such other inferior courts as the General Assembly may, from time to time, in their wisdom establish. There is nothing in the act creating the Commission which suggests that the legislature contemplated that it was to be a court. It is certainly not one of the courts provided for by the constitution, as above set forth, nor does the act declare that it is a court of an inferior character. No method of procedure is provided such as is usual in a court. The Commission has no power to enter a judgment or enforce any mandate by process. It is true that by virtue of the act the commissioners are authorized to investigate transactions connected with the management and control of the State Dispensary anterior to the time that it was abolished and to ascertain if there had been fraudulent practices on the part of the Dispensary agencies in connection with the purchases of liquors, and report their actings and doings to the Governor, but they were not empowered by the act to determine any issue of fact, enter any judgment or conclude any party that might be investigated as to any right or interest involved. The only element of discretion given to the commissioners which we can find at all in the act is in section three (3) where, after providing that the commissioners shall sell the property and collect the debts and pay from the proceeds there-

of all just liabilities, etc., there is the following: "Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate." This can be construed to refer only to sales of the property. In every other respect the duties which devolve upon the commissioners are purely ministerial. It is our opinion, therefore, that the contention that the Dispensary Commission is a court is not well founded.

The proposition that complainant's bill and the testimony in support of it are insufficient to authorize a decree for injunction and receivers *pedente lite* can be readily disposed of. The bill alleges a just debt still existing and unpaid for liquors sold to the Dispensary authorities by complainant. It is further alleged that said debt has been audited by the agency employed by the appellants and has been found to correspond with the entries upon the books kept by the State Dispensary board, and further, that the appellants refuse to pay complainant's debt from the funds in their hands, set apart for that purpose. If these allegations are true, the complainant has the right to invoke the aid of the court. The appellants, in their return to the order to show cause, in paragraph eleven (11), substantially deny the validity of the complainant's debt in the following language: "The Commission is advised by the Attorney-General and his associates that the claim of the plaintiff for goods sold by it to the State Dispensary is unjust and invalid, which they have evidence to establish." This is a practical admission that the appellants did not intend to pay complainant's debt from the fund in their hands. His only recourse, therefore, was by an appeal to a court of competent jurisdiction to determine as to whether or not his debt was just and if so to require the appellants to pay it from the fund in their hands for that declared purpose, and also to have the fund preserved to that end. So we dismiss that part of the case without further consideration.

Since the commencement of this action and the decision of the Circuit Court of the United States for the District of South Carolina that it had jurisdiction, and the issuing of an injunction and appointment of receivers as prayed for in complainant's bill, the Supreme Court of South Carolina, in a case brought before it, has rendered a decision construing the South Carolina statute involved in this controversy, and holds that a suit against the Dispensary Commission (the appellants

in this case) is a suit against the State of South Carolina and, therefore, forbidden by the Eleventh Amendment. The South Carolina Supreme Court is entitled to, and has, our most profound respect, but under the circumstances we do not feel at liberty to adopt the construction given by that tribunal to the South Carolina statute after the rights of complainant have accrued and after he has sought his remedy in a Circuit Court of the United States which has given a construction to the statute contrary to the decision subsequently rendered by the Supreme Court of the State. The law governing us is well settled in the case of *Burgess* vs. *Seligman*, 107 U. S., page 33, in which it is held.

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt

their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

And in the case of *Pease* v. *Peck*, 18 How. (59 U. S.), 595, we find the following principle laid down:

"When the decisions of the State court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions, and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist also when a cause is got up in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State."

It is our conclusion, therefore, that the decree of the Circuit Court for the District of South Carolina, appealed from, should be affirmed. The case will be remanded to be further proceeded with in accordance with the views herein expressed.

Affirmed.

Order Staying Mandate for Forty Days.

Filed Sept. 15, 1908.

THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FOURTH CIRCUIT.

W. J. Murray et al., Appellants,
vs.
The Fleischmann Company and others, Appellees.

On motion of J. Fraser Lyon, Attorney General, B. L. Abney, Stevenson & Matheson, and Anderson, Felder, Roundtree & Wilson, attorneys for appellants.

It is ordered that the mandate herein be stayed for forty days pending an application to the Supreme Court of the United States for a writ of certiorari for the review of the said proceeding.

EDMUND WADDILL, JR.,
Dist. Judge Presiding.

Richmond, Va., September 15, 1908.

And afterwards, at the same term, to-wit: on September 16, 1908, the court made and entered the following decree, to-wit:

Decree.

Filed Sept. 16, 1908.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 821.

W. J. Murray, J[illegible] McSween, Avery Patton et al., Appellants,
vs.
Wilson Distilling Company, et al., and The Fleischmann Company, Appellees.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed, with costs.

EDMUND WADDILL, JR.,
U. S. Dist. Judge Presiding.

Sept. 16, 1908.

Order Staying Mandate for Additional Thirty Days.

Filed Oct. 24, 1908.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

W. J. Murray et al., Appellants,
vs.
The Fleischmann Company, et al., Appellees.
} Order.

It is on motion of attorneys for appellants, and by consent of the attorneys for appellees, ordered that the mandate in this cause be and the same is hereby stayed for thirty days in addition to the forty days stay heretofore ordered.

This 24th day of October, 1908.

EDMUND WADDILL, JR.,
Presiding Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, } ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 5th day of November, A. D., 1908.

(Seal of Court)

HENRY T. MELONEY,
Clerk U. S. Circuit Court of
Appeals, Fourth Circuit.

By CLAUDE M. DEAN,
Deputy Clerk.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fourth Circuit.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 8th day of December, 1908, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified transcript of record on file in the Supreme Court of the United States, upon which the motion for certiorari was made, shall be issued for and constitute the return to the writ of certiorari.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 22nd day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.

Supreme Court of the United States, October Term, 1908.

No. 625.

W. J. MURRAY ET AL., Appellants,
vs.
WILSON DISTILLING COMPANY ET AL. and THE FLEISCHMANN COMPANY, Appellees.

We, the undersigned attorneys for the Appellants and Appellees, do hereby stipulate and agree that the certified transcript of record on file in the Supreme Court of the United States, upon which the motion for certiorari was made, shall be issued for and constitute the return to the writ of certiorari in this case, issued on the 8th day of December, in the year of our Lord One Thousand nine hundred and eight.

Dated December the 12th, 1908.

W. F. STEVENSON,
D. S. MATHESON,
STEVENSON & MATHESON,
J. FRASER LYON,
BENJ. L. ABNEY,
Attorneys for Appellants.
T. MOULTRIE MORDECAI,
FRANK CARTER, &
H. C. CHEDESTER,
GEORGE B. LESTER,
ALFRED S. BARNARD,
Att'ys for Appellees.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed December 22, 1908, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 22nd day of December, A. D. 1908.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. J. Murray, John McSween, and Avery Patton, constituting The State Dispensary Commission of South Carolina, *et al.*, are appellants and Wilson Distilling Company *et al.*, and The Fleischmann Company are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of South Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 21,421. Supreme Court of the United States. No. 625, October Term, 1908. W. J. Murray *et al. vs.* Wilson Distilling Co. *et al.* Writ of certiorari. The execution of the within writ appears from the schedules thereto annexed. Henry T. Meloney, Cl'k U. S. Cir. Ct. of Appeals, 4th Circuit.

[Endorsed:] File No. 21,421. Supreme Court U. S., October Term, 1908. Term No. 625. W. J. Murray *et al.*, Petitioners, *vs.* Wilson Distilling Co., *et al.* Writ of certiorari and return. Filed Dec. 23d, 1908.

No. 625.

In the Supreme Court of the United States

October Term, 1908.

Supreme Court, U.
FILED.
NOV 18 1908
JAMES H. McKENNEY
Clerk

W. J. MURRAY, JOHN McSWEEN, AVERY PA[illegible],
Petitioners,

vs.

WILSON DISTILLING COMPANY ET AL, AND THE FLEISCHMANN COMPANY, *Respondents.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

J. FRASER LYON, STEVENSON & MATHESON,
ANDERSON, FELDER, ROUNTREE & WILSON, ABNEY & MULLER,
Attorneys for Petitioners.

THE STATE CO., LAW PRINTERS, COLUMBIA, S. C.

In the Supreme Court of the United States

OCTOBER TERM, 1908

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, et al., *Petitioners,*

vs.

WILSON DISTILLING COMPANY, et al., and THE FLEISCHMANN COMPANY, *Respondents.*

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween and Avery Patton, constituting said Commission (C. K. Henderson and B. F. Arthur having resigned as commissioners and their offices still being vacant), and W. J. Murray, John McSween and Avery Patton, as individuals; Farmers & Merchants Bank, Walterboro, S. C., The Bank of Hartsville, The Commercial and Savings Bank, Florence, S. C., The Farmers and Merchants Bank, Anderson, S. C., The Merchants and Planters Bank, Gaffney, S. C., The Bank of Dillon, The Central National Bank, Spartanburg, S. C., The Enterprise Bank, Charleston, S. C., The First National Bank, Spartanburg, S. C., The City National Bank, Greenville, S. C., The Peoples National Bank, Charleston, S. C., The Lexington Savings Bank, Lexington, S. C., The Greenville Savings and Trust Company, Greenville, S. C., Norwood National Bank, Greenville, S. C., The Peoples Savings Bank, Abbeville, S. C., Commercial Bank of Camden, National Exchange Bank, Chester, The Bank of Orange-

burg, The Peoples Loan and Exchange Bank, Laurens, The Bank of Charleston, being all of the appellants in the case in the Circuit Court of Appeals for the Fourth Circuit, the decree in which is sought to be reviewed by certiorari, except B. F. Arthur, C. K. Henderson, The Bank of Aiken, Aiken, S. C., The Peoples Bank of Union, Union, S. C., The Piedmont Savings and Investment Company of Greenville, Greenville, S. C., and the Merchants and Farmers Bank, of Spartanburg, S. C., who, after due summons and notice, failed and refused to join in said appeal, respectfully shows:

FIRST.

That in the year 1892, the State of South Carolina, by an Act of the General Assembly, entered upon an experiment in the management of the liquor traffic by taking charge of the business and making it a State monopoly. State officers were designated to manage the enterprise and the funds necessary for its conduct were drawn from the State treasury. The Board of Control, consisting of the Governor, the Comptroller General and the Attorney General, was clothed with the power to make rules and regulations for its management. Subject to these rules, the purchase of liquors and the distribution of them to the subordinate dispensaries was entrusted to an officer called a Commissioner. The business was made by the statute as essentially a part of the government as the management of its taxes or its public schools, and all the assets became as much the property of the State as its asylums or public institutions, or the funds in the vaults of the treasury. The Act was vigorously attacked in the courts as unconstitutional on the ground that the conduct of such a business was not within the police power of the State and was entirely without the sphere of governmental function. The constitutionality of the Act, so far as it provided for the State to own all the liquor brought into the State for sale, and to monopolize the sale of liquor within the State, was finally established by the judgment of the Supreme Court of South Carolina in the case of *State v. Aiken,*

42 S. C., 221, and subsequently by the judgment of the Supreme Court of the United States in *Vandercook v. Vance,* 170 U. S., 443.

Subsequently the following provision was incorporated into the Constitution of 1895: "The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State and may authorize and empower State, county and municipal officers, all or either, *under the authority and in the name of the State,* to buy in any market and retail within the State liquors and beverages in such packages and quantities under such rules and regulations as it deems expedient."

Under this provision of the Constitution, a new Dispensary Statute was enacted (22 Stats., 123,) changing in some particulars the details of the original Dispensary Law, but retaining in its entirety the scheme of State ownership and control. The State Dispensary and all its assets acquired under this statute are to be regarded as the property of the State, and the debts contracted in its lawful management are to be regarded the debts of the State, not only by virtue of the judgments of the highest courts of the land, but also by virtue of the express declarations of the Constitution of the State. With these lights before it, the Supreme Court of South Carolina held, in *State v. Farnum,* 73 S. C., 165, that the State Dispensary was as much a part of the State government and as subject to as full legislative investigation and control as the State treasury.

By the Statute of 16th February, 1907 (25 Stat., 463), the State Dispensary was abolished, and the county dispensary system for the sale of liquors under State authority was established in its stead. On the same date an Act was passed entitled: "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its

affairs." The Act provides for the appointment by the Governor of a Commission composed of five members. The powers and duties of this Commission, stated in short form, were: To close out the entire business and property of the State Dispensary, except the real estate, by selling their assets, collecting debts due and paying from the sales and collections all just liabilities at the earliest date practicable; to sell the liquors on hand to the county dispensaries, if it saw proper, but to no other person in the State; to return liquors illegally bought and to determine the legality of said "purchases" by investigating fully the circumstances surrounding all contracts for liquor; and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants and stenographers and any other person or persons the Commission might deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management and control at any time in the past, and to take testimony "either within or without the State"; to pay to the State Treasurer, after deducting expenses, "all surplus funds after paying all liabilities"; to "submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated, a report in full of their actions and doings." By the last section of the Act it was provided "that the said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary and all the power and authority conferred upon the committee appointed to investigate the affairs of the Dispensary, approved 21st of January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: Provided, That for the purpose of investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and indi-

vidually, or collectively, to exercise the power and authority herein conferred upon the whole Commission."

See *State of South Carolina Ex rel. Lyon, Attorney General, v. State Dispensary Commission*, 79 S. C., 316.

SECOND.

That in December, 1907, and in January, 1908, two separate bills were filed in the Circuit Court of the United States for the District of South Carolina, by the Wilson Distilling Company, et al., and The Fleischmann Company (hereinafter designated the plaintiffs), against the members of said State Dispensary Commission appointed by the Governor of South Carolina under the Act of the Legislature of said State, approved February 16, 1907. The bill filed by the Wilson Distilling Company, et al., was filed in behalf of themselves and all others holding claims for goods sold and delivered to the State Dispensary, and the bill filed by The Fleischmann Company was filed solely in its own behalf. The theory of each of said bills is that by said Act of February 16, 1907, the State of South Carolina placed a fund of about $800,000 in the custody of said Commissioners, divesting itself of the possession and title of and to said funds, and vesting such possession and title in said Commissioners, and creating an irrevocable trust for the benefit of the plaintiffs and other persons holding valid claims against said State Dispensary, which said claims amounted, in the aggregate, to about $600,000; that said Commissioners failed and refused to recognize and execute said trust by paying said claims from said trust funds, and therefore the plaintiffs prayed the Court to declare and execute said trust by a decree establishing both the validity and amount of the several claims, and directing their payment from said trust funds, and, as an incident to the relief sought, they prayed for an injunction and receiver.

The plaintiffs invoked the jurisdiction of the Court upon the sole ground of diversity of citizenship. (Record, pp. 2-7, 17-29.)

THIRD.

On each of said bills orders were issued by his Honor, Judge Pritchard, the Circuit Judge, requiring the defendants to show cause why an injunction should not issue and receivers be appointed, as prayed for, and the status of the fund was preserved by a temporary restraining order (Record, pp. 7-8, 29-30).

FOURTH.

In their return and answer to said rule to show cause, said Commissioners, without submitting themselves to the jurisdiction of the Court, but, on the contrary, insisting that it was without jurisdiction in the premises, averred:

(a) That said suits were, in fact and in legal effect, suits against the State, and not against the Commissioners, or either of them, except as in their official capacity they represent said State, and therefore contrary to the provisions of the Eleventh Amendment to the Constitution of the United States.

(b) That the purpose and intent of said suits was to administer funds and moneys belonging to said State, and in the custody of its duly authorized agents, and to coerce said State in the payment of the alleged debts of the plaintiffs, and to restrain a duly constituted court of the State, in violation of Section 720 of the Revised Statutes.

(c) That the State was a necessary and an indispensable party to said suits, and that under the provisions of said Amendment to the Constitution it could not be made a party.

(d) That the Court, for the reasons stated, was without jurisdiction.

(e) That both the validity and amount of the claims of the plaintiffs were disputed by the State, by its Attorney General and by counsel associated with him, and that at the time of the filing of the bills they were actually engaged in the investigation of all the claims against the State Dispensary, with a view, and for the purpose, of paying from said funds all "just liabilities."

(f) That no trust was created by the Act creating the Commission, but that, on the contrary, the Commission was a mere agent, instrumentality or administrative board, charged with powers, functions and duties belonging exclusively to the Legislative and Executive Departments, and that any interference therewith by the Court would be an encroachment inhibited by the Constitution of the United States.

(g) That the Commission was not impleaded as a wrongdoer—there being no charge of waste, neglect or mismanagement—and that it was sought to vest in the Court the discretion and judgment vested by the Act in the Commission.

(h) That there was no right or necessity for an injunction or receiver and that the bills should be dismissed (Record, pp. 11-16, 41-52).

FIFTH.

A number of persons holding claims intervened and were made parties-plaintiff (Record, p.). The banks in which the funds were deposited by the Commissioners were made defendants, and they were temporarily restrained from paying out the said funds (Record, p. 33).

SIXTH.

The Commission, after investigation, adjudged certain claims against the State Dispensary, amounting to $153,825.43, to be "just liabilities," and the claimants having brought this fact to the attention of the Circuit Judge, an order was passed modifying the restraining order, and authorizing the banks to honor the Commission's checks in settlement of said claims (Record, pp. 156, 205).

SEVENTH.

On March 5th, 1908, Judge Pritchard, the Circuit Judge, after a hearing of the parties, and upon consideration of the bills, returns and affidavits, handed down an opinion and held,

among other things, that the suits were not suits against the State, and that the State was not an indispensable or necessary party, and that an irrevocable trust was created which the Court had jurisdiction to enforce and execute (Record, pp. 88-99), and thereafter, on March 9th, 1908, the said Judge made and filed an order consolidating the bills, enjoining the defendants as prayed, appointing receivers, and directing the Commissioners and the banks to turn over and deliver said funds to the receivers so appointed (Record, pp. 190-193).

EIGHTH.

On March 27th, 1908, all the defendants in the consolidated cause (except those who after due summons and notice failed and refused to join in an appeal), prayed for and were allowed an appeal from said order (granting an injunction and appointing receivers) to the United States Circuit Court of Appeals for the Fourth Circuit and gave bond to prosecute the appeal (Record, pp. 311-320).

NINTH.

On May 26th, 1908, the appeal was argued in said Circuit Court of Appeals before Chief Justice Fuller and District Judges Waddill and Boyd, and September 15th, 1908, the Court handed down a decision sustaining the Circuit Judge in holding that the suits were not suits against the State and that the State was not an indispensable party; that the Act created a trust enforceable in the Circuit Court and that plaintiffs were entitled to injunction and receivers. The Court directed a decree affirming the order appealed from, but granted a stay of the mandate pending an appeal for a certiorari (Record, pp.), and subsequently granted an additional stay for thirty days.

TENTH.

Petitioners further show that on February 24, 1908, the Legislature of South Carolina passed an Act directing the

State Dispensary Commission to pay out of any funds in its hands arising from the business or property of the State Dispensary the sum of $15,000 into the State treasury, to be used for purposes specified in the Act. The Commissioners refused to pay said amount upon demand, because they were restrained from so doing by his Honor, Judge Pritchard, as hereinbefore fully set forth. Thereupon, to wit, on March 4th, 1908, the State, *ex rel.* Lyon, Attorney General, filed in the Supreme Court of South Carolina, a petition for mandamus to compel the Commissioners to comply with said Act and to deliver said sum to the Treasurer. In their response, the Commissioners, for cause, alleged the pendency of the suits against them in the Circuit Court, and that they were restrained by an order therein from paying out or changing the status of said funds, and they attached to their answer a copy of said bills, and of the restraining order, as a part thereof, that on March 14, 1908, and after a hearing of the parties, the said Supreme Court handed down an opinion, in which it held that the suits in the Circuit Court were suits against the State and that the State was an indispensable and necessary party; that the Act of February 16, 1907, did not create a trust, and that the funds in the custody of the Commissioners were not trust funds, but were the property of the State and in its possession through the said Commisisoners as its agents, and subject to the control of the State as much so as the funds in its treasury; that the restraining order made by the Circuit Court of the United States was void, as the court was without jurisdiction in the premises, and constituted no cause why the mandamus should not issue. The Court, for the reason stated therein, directed that the issuing of the peremptory writ be left in abeyance until the further order of the Court (Record, pp. 280-296).

Petitioners attach hereto as a part of this petition, and marked Exhibit "A", the Constitutional Provisions of the State of South Carolina and Acts of the Legislature with regard to the State Dispensary, with Act of February 24,

1908, directing payment of the $15,000 in the State Treasury for the prosecution of violators of the Dispensary law.

ELEVENTH.

On March 27, 1908, the Circuit Judge, of his own motion, made an order authorizing the Commissioners to pay over to the Treasurer the said sum of $15,000.

TWELFTH.

Petitioners further show that upon their qualification, each Commissioner gave bond to the State for the faithful performance of his duties, as required by the said Act, and that each of the banks, as security for the deposits, delivered to the Commissioners bonds, stocks and other collaterals, which are now in the treasury of the State of South Carolina; that petitioners are advised that if they withhold the funds from the receivers of the Circuit Court of the United States, they and each of them are subject to be adjudged in contempt of said Court, and continuously so until its order is complied with; that in this matter the decision of the Circuit Court of Appeals is final, unless this Honorable Court exercises its discretionary jurisdiction in the premises.

Petitioners are also advised that if they deliver the said funds to said receivers, then, under said decision of said Supreme Court of South Carolina, the Commisisoners and their sureties, as well as the banks, are liable to the State for the funds thus delivered to the receivers, and to any action in a court of said State against either or all to enforce such liability, or for a judicial sale of the collaterals deposited by said banks with said Commissioners as aforesaid, the order of the Circuit Court of the United States would not constitute a defense, and the delivery of the funds to the receivers, as required by the order, would not affect such liability.

Petitioners further show that the Circuit Court of Appeals for the Fourth Circuit, and the Supreme Court of South Carolina, are independent of each other, and the decisions of one

are not controlling on the other, but that each of said courts will yield only to the decision of this Honorable Court.

Petitioners therefore submit that without regard to whether the Act creating said Commission was correctly construed by said Circuit Court of Appeals, or whether it was correctly construed by the Supreme Court of South Carolina, it is not only proper, but absolutely necessary for the protection of your petitioners that this Court exercise its discretionary power to issue the writ of certiorari, and bring said case before it for adjudication, so as to enable petitioners to obey the orders and decrees of one of said courts, without disregarding the orders and judgments of the other, and to act in the premises with safety to themselves; and that, aside from the conflict between the Circuit Court of Appeals and the Supreme Court of the State of South Carolina, the questions in the case, and upon which the said courts have reached opposite conclusions, are of paramount gravity and importance, involving the suability of the State, whether the State is a necessary and indispensable party to suits against its officers or administrative boards, where it is sought to coerce the payment of disputed debts of the State, and whether the Circuit Court of the United States has jurisdiction of this case, and whether its orders and judgments are not void and may be ignored by independent courts of coördinate jurisdiction.

THIRTEENTH.

Your petitioners further submit that the said decree of the Circuit Court of Appeals, affirming the order of the Circuit Court, granting injunction and appointing receivers, should be reversed, because the said Circuit Court of Appeals erred:

1. In holding that the suits were not suits against the State in violation of the provisions of the Eleventh Amendment to the Constitution.

2. In holding that the State was not a necessary and an indispensable party to said suits.

3. In holding that the Circuit Court had jurisdiction of said causes.

4. In holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

5. In not holding that there was no equity in said bills, and no cause or necessity shown for the grant of an injunction or the appointment of receivers.

6. In not reversing the order and decree granting an injunction and appointing receivers.

7. In not directing a dismissal of the bills and each of them.

Your petitioners believe that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled "W. J. Murray, John McSween, Avery Patton, et al., Appellants, versus Wilson Distilling Company, et al., and The Fleischmann Company, Appellees," to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891; and that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals in

the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

W. F. Stevenson
(Abercrombie Matheson)
J. Rosen Lyon
B. L. Abney

SOUTH CAROLINA,
Richland County.

W. J. Murray, being sworn, says that he is one of the above named petitioners, and that the foregoing petition is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

W. J. Murray

Sworn to and subsribed before me this 30 day of October, 1908.

R. R. Bruce (Seal)
Notary Public for South Carolina.

EXHIBIT "A".

Constitutional Provisions.

Article VIII, Section 11, Constitution 1895.

"In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower State, county and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided,* That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further,* That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same."

Article XI, Section 12, Constitution, 1895.

"All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this Article; and if after said application there should be a surplus, it shall be devoted to public school purposes, and apportioned as the General Assembly may

determine: *Provided, however,* That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

STATUTES.

A Concurrent Resolution.

To Investigate the State Dispensary.

Be it resolved by the Senate, the House of Representatives concurring:

Section 1. That a Joint Committee, consisting of three Senators and four members of the House of Representatives, be appointed by the presiding officers of the respective Houses to investigate the affairs of the State Dispensary.

Sec. 2. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to appoint an expert accountant and stenographer, and to investigate all transactions concerning said Dispensary and its management, and to take testimony either within or without the State, and shall have access at all times during their service to all the books and vouchers and other papers of said institution, especially in investigating the following facts:

(a) Whether or not it is a fact that houses represented by agents who are near relatives of the members of the Board of Directors, receive large orders at each purchase.

(b) Is it a fact that members of the Board of Directors are, or have been, agents for certain wholesale houses from which large purchases are made?

(c) Is it a fact that parties to whom large orders are given are not wholesale dealers, but brokers, and that the orders are filled by third persons, thus making the State pay the commissions of the middle-man?

(d) Was it necessary to purchase the large quantity of liquors ordered in December, 1904, to fill demands and especially the new and fancy goods purchased, which is unknown to the trade?

(e) Are the extraordinary heavy purchases made necessary to the best business interest of the Dispensary system?

(f) What is the financial standing of the business, and is it run on the best principles for the interest of the law as originally passed and amended?

(g) Is it a fact that the State, through the Dispensaries, is violating the Constitution of 1895, in that it is selling whiskey in less quantities than one-half of one pint?

(h) Is it a fact that the State is selling 5's in case goods to its customers and charging them for one quart?

(i) Is it a fact that certain agents are traveling over the State and offering special inducements to County Dispensers to "push" certain brands of liquors, and, if so, is it a fact known to the members of the State Board of Directors?

(j) Is it a fact that certain requirements of the law are dispensed with by County Dispensers by order of, or by the consent of, the members of the State Board of Directors?

(k) Has the whiskey which has been recently purchased been ordered out from the dealer, or is it held in reserve for future delivery?

(l) What is the indebtedness of the Dispensary for liquors which have been bought but not delivered?

(m) And any and all other matters relating to the management of the State Dispensary, and of any official or person in relation thereto.

(n) Is it, or not, a fact that excessive freights have been paid to railroads for transporting liquors into the State, when said liquors could have been shipped into the State by water at less cost to the State?

(nn) Whether there is any warrant of law or authority for the establishment and conduct of what is commonly known as "Beer Dispensaries," as they are now and have been conducted.

SEC. 3. That said Committee may at any time they may deem it advisable call to their assistance any of the State officers or employees of the State Dispensary, whose duty it shall be to render the said Committee any reasonable service that may be

required of them within the scope of its functions as prescribed by these Resolutions.

SEC. 4. That the said Committee shall convene as soon after the adjournment of this session of the General Assembly as practical, and shall organize by electing one of their number as Chairman, and shall report its findings to the next session of the General Assembly. That said Committee shall receive the same per diem and mileage as members of the General Assembly, and that the sessions of said Committee be open to the public.

SEC. 5. That nothing herein contained shall be construed to deny the said Committee the power to apply at any time to the General Assembly for such other power and authority as the circumstances arising during the investigation may seem to require.

SEC. 6. That said Committee shall have the right to punish for contempt as Courts of Common Pleas and General Sessions.

SEC. 7. That said Committee shall have a Marshal to serve its processes and keep order at its sessions, and his pay shall be fixed by said Committee. The pay of the witnesses shall be the same as that of witnesses in the Court of Common Pleas for Richland County, and all expenses shall be paid on the warrant of the Chairman of said Committee by the Liquor Commissioner out of the General Dispensary fund and charged as Dispensary expenses.

SEC. 8. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to employ expert accountants and stenographers and any other person or persons the Committee may consider necessary in the ascertainment of any facts pertinent to this inquiry; and said Committee is hereby authorized and empowered to investigate and inquire into all transactions connected with said State Dispensary and its management or control at any time in the present or past, and to investigate any and all purchases, sales, shipments, contracts, or other like transactions; and the personal connection, if any, of any member or members of the State Board of Control, or the State Liquor Commissioner, or any other citizen or official of this State, in the present or past, with any other corporation, concern or individual contracting with or supplying any spirituous

or intoxicating liquors, or other goods or commodities to said Board or Commissioner, or to the State; to take testimony either within or without the State; and to have access to all the books and vouchers and other papers of said institution or of any officer or employee thereof.

SEC. 9. That the costs and expenses of this investigation be paid by the State Dispensary, each member of said Commission to receive $4.00 per day and the usual mileage.

Passed January 31, 1905.

AN ACT TO PROVIDE FOR THE INVESTIGATION OF THE DISPENSARY.

Whereas, a Committee has been appointed to investigate the State Dispensary under the Concurrent Resolution of the General Assembly, dated the 31st day of January, 1905; and whereas, in the progress of the work of the said Committee some doubt has arisen as to the power of the said Committee in the discharge of their duties; and it being provided in Section 5 of said Concurrent Resolution that the said Committee should apply to the General Assembly for such other power and authority as the circumstances arising during this investigation may seem to require; therefore,

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the Committee heretofore appointed under the terms of the Concurrent Resolution, dated the 31st day of January, 1905, or any other Committee or Committees that may be appointed, are hereby authorized and empowered to elect a Marshal, who, upon being sworn, shall be and become a peace officer of the State, and invested with all the power of Sheriffs and Constables in the service of any and all process issued by the Committee aforesaid, and with the power to arrest and imprison, upon the order of the said Committee, any and all persons who shall fail and refuse to obey any legal order of the said Committee, or who shall be guilty of any disorderly conduct in the presence of said Committee during any session thereof, or who shall be guilty of any contempt of the said Committee.

SEC. 2. The said Committee be, and are hereby, authorized and empowered to call before them by summons or notice, in such form as the Committee may adopt, and to be served by the Marshal of said Committee, or such other officer of the State as may be by the Committee required, such person or persons as the Committee deem proper, and to require such person or persons to answer, upon oath, any and all questions that the Committee may deem relevant and may propound to him or them; and upon the failure or refusal of such person or persons to obey such summons or notice, or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said Committee, and may be imprisoned upon the order of the said Committee in the common jail, to be there held until he or they shall comply with the order of the said Committee: *Provided*, That no testimony given by said witness shall be used against them in a criminal prosecution.

SEC. 3. The said Committee be, and the same is hereby, authorized to send for and to require the production of any and all books, papers, or other documents or writings which may be deemed relevant to any investigation, and to require said person or persons in custody or possession of said papers to produce the same before the said Committee, and any person or persons who shall fail or refuse to act on the order or notice of said Committee to produce said books, papers, or other documents, or writings, shall be deemed guilty of contempt of said Committee and be punished as provided in Section 2.

SEC. 4. Said Committee shall have power to administer necessary oaths, and any person who shall, after being sworn before said Committee, swear falsely, shall be deemed guilty of perjury, and, upon conviction, shall be punished as provided by law.

SEC. 5. That said Committee be, and they are hereby, authorized and directed to order the Commissioner of the State Dispensary to withhold the payment of any claims against the State Dispensary or any officer thereof, or the claims of any creditor against said State Dispensary or any of its officers, which they may deem advisable, until same is duly proved by the production of the books of the original entry, and all documents and correspondence relating to all their transactions with the State Dispensary, and to require the person or persons in custody or pos-

session of said books, documents, papers, and correspondence to produce the same before the said Committee in person, and when such proof has been submitted to and approved by the said Committee, and the State Treasurer is hereby forbidden to pay such claims upon written notice from the Chairman of the said Committee.

SEC. 6. This Act shall take effect and be in force immediately upon its approval by the Governor.

Approved the 24th day of January, A. D. 1906.

AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY, AND TO WIND UP ITS AFFAIRS.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well-known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

SEC. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel

s may be approved by the Attorney-General, and such expert ccountants and stenographers and any other person or persons he Commission may deem necessary for the ascertainment of any act or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, ither within or without the State: *Provided, further,* That all ayments shall be made in gold and silver coin of the United tates, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said Commission hall be $5 per day for each day actually employed about the usiness, and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on his Commission after January 1, 1908.

SEC. 5. The said Commission shall pay to the State Treasurer, fter deducting their compensation and other expenses allowed y this Act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said Commission is hereby authorized to employ uch bookkeepers, accountants, clerks, assistants and employees s they may deem necessary, and to contract with them at the me of employment for their compensation.

SEC. 7. The said Commission shall submit to the Governor, t the earliest day practicable, a complete inventory of all property eceived by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report n full of their actings and doings.

SEC. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of he Dispensary, approved 24th January, A. D. 1906, be, and ereby is, conferred upon the Commission provided for under his Act: *Provided,* That for the purpose of the investigation f the affairs of the Dispensary, as herein provided, each and very member of said Commission be, and hereby is, authorized nd empowered, separately and individually, or collectively, to xercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D. 1907.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY AND TO WIND UP ITS AFFAIRS," SO AS TO PROVIDE COMPENSATION FOR MEMBERS OF THE SAID COMMISSION FOR THE YEAR 1908, AND TO PROVIDE FOR THE SALE OF THE REAL ESTATE HERETOFORE USED IN CONDUCTING THE DISPENSARY, AND TO FURTHER PROVIDE FOR WINDING UP THE AFFAIRS OF THE STATE DISPENSARY.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That an Act entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs," approved the 16th day of February, 1907, be, and the same is hereby, amended by striking out the figure 8 at the end of Section 4, and inserting in lieu thereof the figure 9, and by adding at the end of said section the following: "That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of ($150.00) one hundred and fifty dollars:" *Provided, further,* That the per diem provided for herein shall begin on the date of the approval of this Act.

SEC. 2. That said Act be further amended by adding at the end thereof the following as Section 9: "Section 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, the typewriters, adding machines, files, metal, and other furniture in the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided,* That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same: *Provided, further,* That the typewriters, adding machines, files, metal, and other furniture may be transferred by the Commissioners of the Sinking Fund to any of the

State offices that, in the judgment of the Commissioners, may need them.

SEC. 3. That said Act be further amended by adding the following as Section 10: "Section 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State, and arising from the assets of the Dispensary."

SEC. 4. That said Act be further amended by adding the following as Section 11: "Section 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary, and to pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have been, or may hereafter be collected by said State Dispensary Commission: *Provided,* That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court as in cases at law: *Provided further,* That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court." So that said Act, when so amended, shall read as follows:

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.00.

Sec. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except

real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State, except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further*, That all payments shall be made in gold and silver coin of the United States currency or in national bank notes.

Sec. 4. The compensation of each member of said Commission shall be five dollars ($5.00) per day for each day actually employed about the business and actual expenses for the time engaged: *Provided*, That they shall receive no compensation for services rendered on this Commission after January 1, 1909; *Provided further*, That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of one hundred and fifty dollars ($150.00): *Provided, further*, That the per diem provided for herein shall begin on the date of the approval of this Act.

Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants, and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

Sec. 8. The said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided*, That for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Sec. 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required, upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell the same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided*, That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same.

Sec. 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State and arising from the assets of the Dispensary.

Sec 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the

State growing out of dealings with the Dispensary. And to pay for the State any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have or may hereafter be collected by said State Dispensary Commission: *Provided,* That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court, as in cases at law: *Provided, further,* That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court.

Sec. 12. That no funds arising from the sale of the assets of the former State Dispensary, or from the collection of debts due the said Dispensary, or moneys delivered by the State Treasury to said Commission, shall be paid out for any purpose or to any person whatsoever, except upon the check of the chairman of said Commission, countersigned by the Treasurer of the State of South Carolina. And the Treasurer of the State of South Carolina shall countersign such checks as may be presented by the chairman of said Commission only upon presentation of the same, together with a certificate of said Commission or a majority thereof, which certificate shall show: that the said check is issued in payment of some expense provided for by statute, or necessarily incident to closing up the affairs of the Dispensary, or for services rendered said Commission in closing up the affairs of said Dispensary, or contracted for in accordance with law by said State Dispensary Commission, or that it is in payment of a claim of a creditor which has been adjudged by said Commission to be due, and upon such adjudication ordered paid.

In the Senate-House the 21st day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.

RICHARD S. WHALEY,
Speaker of the House of Representatives.

Approved the 24th day of February, A. D. 1908.

M. F. ANSEL,
Governor.

AN ACT TO MAKE APPROPRIATION TO MEET THE EXPENSES OF CRIMINAL PROSECUTIONS AND PROCEEDINGS AGAINST CERTAIN OFFICERS AND OTHER PERSONS, AND TO PROVIDE FOR THE PAYMENT THEREOF.

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and is hereby, appropriated to meet the expenses of any criminal prosecutions that have been or may be commenced against any person or persons charged with violation of the law in any manner connected with the late institution called the State Dispensary, including expenses of associate counsel, and such other expenses as may be incident thereto: *Provided,* That the Attorney-General shall not employ any member of the General Assembly as attorney in said prosecutions.

Sec. 2. That the said sum of fifteen thousand dollars shall be paid into the State Treasury by the State Dispensary Commission out of any funds in its hands arising from the business or property of the State Dispensary, and the same shall be paid out by the State Treasurer upon the warrant of the Comptroller-General; and accounted for in the same manner as other funds appropriated for the use of the Attorney-General's office.

Sec. 3. That this Act shall take effect immediately upon its approval by the Governor.

In the Senate-House the 22d day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.
RICHARD S. WHALEY,
Speaker of the House of Representatives.

Approved the 24th day of February, A. D. 1908.

M. F. ANSEL,
Governor.

In the Supreme Court of the United States

October Term, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON et al., Petitioners,

against

WILSON DISTILLING COMPANY et al. and THE FLEISCHMANN COMPANY, Respondents.

Brief of Solicitors for Petitioners on Writ of Certiorari.

J. Fraser Lyon, W. F. Stevenson, E. W. Kemmerer, E. L. Ahern, Counsel for Petitioners.

In the Supreme Court of the United States.

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON ET AL., PETITIONERS.

versus

WILSON DISTILLING COMPANY ET AL. and THE FLEISCHMANN COMPANY,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY J. FRASER LYON, W. F. STEVENSON, D. W. ROUNTREE, B. L. ABNEY, Counsel for Petitioners.

I.

ARE THE PETITIONERS ENTITLED TO THE WRIT?

The power of the court to grant the writ to review a decree of the Circuit Court of Appeals upon an appeal from an interlocutory order granting an injunction and appointing receivers is beyond question, as the court has repeatedly ruled "that the power of this court in certiorari extends to every case

pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that Court."

Forsyth vs. Hammond, 166 U. S., 514.
The Three Friends, 166 U. S., 1.
American Constr. Co. vs. J. T. & K. W. Ry. Co., 148 U. S., 372.
Fields vs. United States, 205 U. S., 292.

The original jurisdiction of the Circuit Court was invoked upon the sole ground of diversity of citizenship and the questions as to the jurisdiction of the Court and the application of the Constitution of the United States were subsequently raised in the answer and return of petitioners. It is well settled that a certiorari will lie without regard to whether the decree sought to be reviewed is final or interlocutory.

American Sugar Refining Co. vs. New Orleans, 181 U. S., 277.
Boston & Maine R. R. vs. Gokey, 210 U. S., 161.

The reasons for the exercise of this discretionary power are fully set forth in the petition and need no elaboration.

The conflict between the decisions of the Court of Appeals and the Supreme Court of South Carolina, fraught with disastrous results to the Commissioners and the banks, brings the case within the principle announced and emphasized by this Court.

Forsyth vs. Hammond, 166 U. S., 514.
Taylor on Jur. & Prac. Sup. Ct. U. S., Ps. 100 & 102.

II.

UPON THE MERITS.

We propose to treat our assignments of error as presenting three questions:

(1) Whether the suits are suits against the State;

(2) Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund;

(3) Whether the Act of 1907 created a trust and divested the State of all control or disposal of the State Dispensary property.

(1) *Whether the suits are suits against the State.*

The Circuit Court of Appeals reached its conclusion that these suits were not suits against the State by the following course of reasoning:

"The State, through its Legislature, has passed both the title and possession of the fund involved to the Commission for the purposes designated in the act, the first of which is to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations. The fund being in the hands of the Commission charged with this duty, the State had no interest in so much thereof as is necessary to pay the just debts; then, how can it infringe any right of the State to have the true amount of the debts due by the defunct Dispensary judicially ascertained? . . . . We are constrained to hold the fund in their hands is by virtue of the provisions of the Act held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the fund in the hands of the Commission to the extent that the debts are shown to be just, and that a judicial determination of the true amount of such debts can in no way affect the rights or interests of the State, the only interest of the State in the fund being, as declared by the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities. . . . This suit is not against the State, nor is the State an indispensable party. Treating the fund in the hands of the appellants as a trust fund, and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties."

Upon this question we do not consider it necessary to go further back than the provisions of the Constitution of South

Carolina of 1895, and the Acts made in pursuance thereof. The Constitution of 1895 created and authorized the operation of a State Dispensary as a part of its governmental machinery. The clauses of the Constitution referring to this are Article 8, Section 11, and Article 11, Section 12. The Constitution of 1895 went into effect from and after the 31st day of December, 1895. In pursuance of such Constitution, the first Act of the Legislature was an Act, approved March 6, 1896 (22 Stats., 123). All other Acts relating to or amending this Act were made subject to and derive their authority from the sections of the Constitutions above named. With some changes from time to time, this law continued until February 16, 1907, when, by Section 47 of the Act, approved on that date, and which went into effect thereupon, the State Dispensary was abolished, and the regulation and sale of alcoholic liquors and beverages within the State was devolved upon the several counties through County Dispensary Boards (25 Stats., 462); the Legislature, however, distinctly declaring in said section that the repeal of the law establishing the State Dispensary should not have the effect of [redacted] the former Dispensary statutes for punishing as provided by law offences theretofore committed. The effect of this statute was simply to take the power of purchasing whiskeys and the making of contracts therefor out of the hands of the State Board of Control, which had theretofore been elected by the Legislature, and to devolve the authority, under Section 11, of Article 8, of the Constitution, upon county officers and not upon State officers. Section 6 of the Act of 16th February, 1907, 25 Stats., 468. That section is as follows:

"Section 6. The members of the said County Dispensary Board are hereby declared to be county officers, and are hereby authorized and empowered, under the authority and in the name of this State, to buy in any market and retail within the State liquors and beverages, as provided herein: Provided, That the State shall not be liable upon any contract for the purchase thereof beyond the actual assets of the Dispensary for which the purchase is made. The members of the County Dispensary Board and all Dispensaries shall be persons of known

moral character and not directly or indirectly applicants for appointment."

It is, therefore, too broad an assertion to say that the State of South Carolina has gone out of the whiskey business. It has simply distributed the power of purchasing and the sale of whiskey to the counties of the State or to county officers of the State, and not the State officers, while the purchases are still expressly made in the name of the State and under its authority, thereby expressing, as we submit, the intention of the Legislature never to change the relation between the State and that of the vendors of whiskeys from that of debtor and creditor, the relation which existed at the time the Act creating the Commission was passed. The sale of whiskey in South Carolina is still a departmental branch of its government, as construed by its Courts, and on account of such purchases the State is still the debtor to the vendor, and no action can be brought against the State on account of its immunity, nor against the County Boards because they represent the State.

It is apprehended that the learned Circuit Court of Appeals in its opinion has laid too much stress upon the point that the State Dispensary has been abolished, and that thereby the intention can be derived that it has abandoned its former policy of still keeping up the business through a State agency, and that, in so retiring from the business, it was the intention to declare a trust upon the property it held in connection with the State Dispensary in favor of the parties with whom the State had been dealing, honestly or dishonestly.

In view, therefore, of the Constitution and statutes of the State, it is clear that, at the time the State Dispensary was abolished on the 16th of February, 1907, the relation existing between the State and the alleged vendors of alcoholic liquors was that of debtor and creditor, and that the State Dispensary Board was simply the agent through whom the alleged contracts were made, being, as declared both by the statutes and by the decisions of the Courts of the State construing such statutes, officers of the State.

State vs. Farnum, 73 S. C., 165.

The relation of creditor and debtor existing between the vendors and the State on contracts made by State agents under statutory authority, what effect and result has been brought about by the Act of February 16, 1907, providing for the disposition of all the property connected with the State Dispensary, and to wind up its affairs? 25 Stats., 835.

The petitioners contend that the relation of creditor and debtor existing between the vendors and the State was not changed, and that by such Act a Commission was created to investigate, to determine and to declare what was the true indebtedness of the State to such alleged creditors on account of the purchases of alcoholic liquors, and upon such ascertainment to pay the amount so ascertained and determined by them; that, inasmuch as the Legislature had been for two years investigating the alleged fraudulent purchases and sales of whiskey made to and with its officers, the State Dispensary Board, and inasmuch as it had been satisfied that the present Board had been guilty of fraudulent and illegal conduct, and the Governor had, upon its suggestions, removed the Board of Control (*State, ex rel., vs. Ansel, Governor,* 76 S. C., 395; *Ex parte Parker,* 74 S. C., 466), it desired to create, and did create by this Act, a Commission to continue the labors and work of legislative committees, and clothed such Commission so created with all of the powers held by and conferred upon such committees, with the additional power heretofore mentioned of determining, ascertaining and paying the debts found to be true and just liabilities. It did not propose to relinquish control over the question of these claims, and expressly required reports to be made to the Governor, who, it is apprehended, had the power to direct and to require its law officers, in the name of the State, to sue for the moneys illegally obtained by the parties dealing with the Dispensary Board. Hence the investigation which the Commission was to carry on was not confined to purchases made for which claims were to be presented, but it was to proceed with the work of investigating into prior purchases and into the alleged fraudulent conduct of State officers.

This is plainly seen when reference is made to the sixth section of the Act, wherein the State Dispensary Board was

abolished, and in which it is declared that such prior offenses could still be prosecuted and the offenders punished.

From all which it is submitted that the Legislature, by such Act, did not intend to make an absolute assignment of this particular property for the benefit, either specially or generally, of the alleged creditors, who should be paid simply upon presentation of their claims, and whose claims should simply coincide with the items and amounts upon the books of the State Dispensary Board, with whom it was charged they had had fraudulent dealings, on account of which they had been removed from their offices by the Governor of the State.

The petitioners, therefore, cannot take the view entertained by the Circuit Court of Appeals that this act was similar in substance to the usual form of conveyance of property in trust for the benefit of creditors, and that the State, acting through the Legislature, passed the absolute title and possession of the property to the Dispensary Commission. On the contrary, they believe that the proper view is that the Legislature, in accordance with the power given it under Article 17, Section 2, whereby it is authorized to direct by law "in what manner claims against the State may be established and adjusted," created a tribunal to investigate the *bona fides* and legality of these claims, and to determine the just liability of the State to these alleged creditors, clothing it with adequate and sufficient judicial power to have such investigation and to carry out the duties devolved upon it.

Such commissions and tribunals are not unusual in South Carolina, nor in other States or even with the Federal government. They may not be courts in the sense of the Federal Constitution and statutes, nor in the sense of the State Constitution and its statutes. Nor, while it was made an assignment of error, was it insisted upon in argument that it was under the Act of 1907 a court, but that it was such under the amendatory Act of 1908, which may be hereinafter referred to.

The Commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay

the same over out of the fund. The assets are still the assets of the State. Being officers of the State, with the funds of the State in their possession belonging to the State, and these suits being brought by alleged creditors of the State. the State is the real party in interest, and the suit is virtually against the State.

Opinion Supreme Court of South Carolina, Rec. 280, *et seq.;*
Brown University case, 56 Fed., 55;
Yale College case, 52 Fed., 177;
Lowery vs. Thompson, 25 S. C., 416;
Board, etc., vs. Gant, 76 Va. ;
Louisiana vs. Jumel, 107 U. S., 711.

In *Hagood vs. Southern*, 177 U. S., 52, where bills were brought in the Circuit Court of the United States, the Court said:

"The suits are accurately described as bills for the specific performance of the contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with that consent it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contracts by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced

or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' "

Further, the Court said:

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be."

We do not consider that it would be useful to undertake to discuss the many cases which have been determined by the Supreme Court of the United States, for it seems to us clear that this case cannot be classified with those cases which are brought in a court of equity or by mandamus to require officers to perform a plain official duty, the position in which the Circuit Judge appears to maintain that this case falls. There is no claim made, and none can be made, that the Act of 1907 is unconstitutional, either impairing their original contract right or depriving them of property without due process of law. The State Dispensary Commission are not defending any case of trespass or of wrongs they may have committed towards the persons or property of the complainants under an unconstitutional statute; nor are they affirmatively, through and by means of an unconstitutional statute, injuring the complainants or invading any of their property rights; nor are they attempting to enforce an unconstitutional statute. Consequently, this case does not fall within any class of cases mentioned by the learned Circuit Court of Appeals, nor is it similar to any of the cases cited by the learned Court. These suits fall into that class of cases where the action of the Court will have the effect of depriving the State of funds or property in its possession, which class of cases comes into conflict with the Eleventh Amendment.

(2) *Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund.*

Assuming the construction of the Circuit Court of Appeals to be correct, that the legal title, possession and control of the property had passed to the Commission under the terms of the Act of 1907, still, as these claims had to be established against the State, our assignment of error is that the State must necessarily be a party to such adjudication as one of the beneficiaries of the trust and one interested in the fund to be disposed of, and, being such indispensable party, under the rules and practices of the Court, the Court not being able to make the State a party, the bill must be dismissed, and the Court is without jurisdiction to proceed further.

The prayers of both bills of complaint are that it shall be referred to a master to ascertain and determine the amount due the complainants for goods sold and delivered by them to the State Dispensary, and that a decree be entered ordering and directing the amounts so found to be due to be paid. The State Dispensary Commission, neither as a Commission nor as individuals, have any personal interest in the funds. They have only certain official duties to perform. There is nothing in the statute which authorizes them to appear in court to prosecute or defend actions brought by these creditors against the State, nor has the State provided in such action that its law officer shall represent it in any judicial investigation in State or Federal Court; but the claims to be investigated and determined are claims and alleged debts not of the State Dispensary Commission, but of the State of South Carolina. For we conceive that, where it is referred to a person or commission to determine upon the liability of the donor, both legal anl equitable, such person or commission, as such trustee, thereby created, cannot be reduced to the rank of attorney and agent for the party and required to defend his interests. The sole party interested in defeating wholly or in part each and every one

of these claims is not the Commission but the State of South Carolina, which is entitled to the remainder of the money after the payment of all just liabilities. The judgment to be rendered is a judgment not against the State Dispensary Commission, but in each and every one of these claims it is a judgment against the State of South Carolina, and if jurisdiction is retained we necessarily will have a case or cases where the complainants are prosecuting claims against the State of South Carolina as their debtor in a court in which the State is not represented and is not a party, and in which it is sought to enter a decree or judgment against her and to take funds to satisfy such judgment or decree which otherwise would belong to the State, and which, under the terms of the Act, should be returned into her treasury.

The Circuit Court of Appeals held:

"This suit is not against the State nor is the State an indispensable party. Treating the fund in the hands of the appellants as a trust fund and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties."

It further holds that the provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors, and notwithstanding the State is the donor of the trust and is entitled to the surplus after the payment of its just liabilities to be ascertained by said Commission, and the expenses thereof, that it does not have any present interest in the fund in controversy which can be divested by a judicial determination of the true amount, if any, justly due the complainants, although it is not a party to such judicial investigation. We respectfully submit that the Court of Appeals has committed error, and that the State is a necessary and indispensable party, even upon the assumption that the State has passed absolute control and possession of the property to the State Dispensary Commission.

In *Gregory vs. Stetson*, 133 U. S., 586, it is said:

"The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl., Sec. 72: 'It is a general rule in equity (subject to certain exceptions, which will be hereafter noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.' See, also, Daniel's Chancery Pl. & Pr., 246 *et seq.*"

The Court further said:

"In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's rights without having him either actually or constructively before it. This principle is fundamental."

In the case of *Minnesota vs. Northern Securities Co.*, 184 U. S., 235, it is said:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, so that there may be a complete decree which shall bind them all. * * * The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear

reasoning, and may be enforced by the courts *sua sponte*, though not raised by the pleadings or suggested by counsel;" citing cases.

Again, quoting from *Minnesota vs. Northern Securities Co., supra:*

"When it appears to a court of equity that a case otherwise presenting ground for its action cannot be dealt with because of the absence of essential parties, and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in the case before the court, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend."

See, also, the late case of *Garzot vs. de Rubio,* 209 U. S., 297.

Where it is clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

Cunningham vs. Macon R. R. Co., 106 U. S., 446.

A State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

Christian vs. Atlantic, &c., R. R., 133 U. S., 233.

We do not concede that these cases come within that class in which the interests of the State may be indirectly affected by judicial proceedings without making it a party, for in those cases the title in fee or the possession of the property is not in the State, but it only has some lien or claim against it subordinate to and not involved in the prior claim; such as in the case where it is a subsequent mortgagee. There its right of redemption will not be affected, nor is its right necessarily involved in that of the prior mortgagee. But in this case the claims that are to be presented are disputed in toto, and the

State is a party to such contract and is the proper person to make the defense against such claims.

In *Vetterlein vs. Barnes*, 124 U. S., 167, the rule is recognized that, to a suit against trustees to enforce the execution of the trust, *cestuis que trust* claiming present interests directly opposed to those of the plaintiff should be made parties in order that they may have opportunity themselves to defend their rights and not to be obliged to rely upon the defenses made by the trustees, or to resort to a subsequent suit against the trustees of the plaintiffs, or to take the risk of being bound by a decree rendered in their absence.

But it was also stated that the rule is different where the claim of the plaintiff antedates the creation of the trust and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it as fraudulent and void.

Here it is claimed that the suit is brought to enforce the trust and not in opposition to the trust. The rule, therefore, must prevail that the State is one of the beneficiaries of the trust and a party to these contracts, and entitled to set up all proper and legal defenses against it, and should be made a party to the suit, for its right to the surplus is directly dependent upon its defeating the claims which it disputes.

"In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous. If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties; but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be made parties."

Perry on Trusts, 3 ed., Sec. 595, citing *Haugton vs. Davis*, 23 Me., 28.

"When a trust is created for the benefit of certain specified creditors, and a suit is brought against the trustees for the execution of the trust, not only should those creditors generally be made parties, but the person who created the trust also, or

his personal representative." Story, Eq. Pleadings (10 Edition), Sec. 149.

See, also, Story's Equity Pleading, 10th ed., Secs. 149 and 207; 6 Pomeroy's Equity Jurisprudence, Secs. 713, 891.

"The true principle would seem to be that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent or validity of the assignment is not doubted or denied, and there is no remaining liability of the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case. * * * But, where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, there he is not only a proper but a necessary party. The general rule will hereafter occur under other aspects where the legal estate is in one person and the equitable estate is in another, and where the equitable or legal interest assigned still leaves some rights or claims to be settled in which the presence of the assignor may be material to his own interests or to those of the adverse party."

Story's Eq. Pl., 10 ed., Sec. 153, and notes.

In *Barney vs. Baltimore City*, 6 Wall., 280, it is said:

"There is a third class (of parties) whose interest in the subject-matter of the suit and the relief sought is so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, and these parties cannot be subjected to its jurisdiction."

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, where a person will be directly affected

by a decree he is an indispensable party, unless the parties are too numerous to be brought before the Court, when the case is subject to a special rule. Secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if it is possible, and the Court will not proceed to a decree without him if he can be reached. Thirdly, where he was not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

Williams vs. Bankhead, 19 Wall., 571.

Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund and liable by a decree to have it wholly swept from him is an indispensable party.

Williams vs. Bankhead, 19 Wall., 563.

Upon a bill filed by the United States proceeding as an ordinary creditor against a debtor of its debtor for an accounting, etc., the original debtor to the United States ought to be made a party to the account taken between him and his debtor.

United States vs. Howland and Allen, 4 Wheat., 108.

The reason is that a decree in favor of the United States against the debtor of its debtor would not be binding against the original debtor of the United States, and, therefore, the original debtor must be made a party to the suit.

If the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties.

Mallow vs. Hinde, 12 Wheat., 194.

The amount due these complainants, as appears from the record, is not fixed, but is open to controversy, and, as is said in *Mullow vs. Hinde, supra,* no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.

Chadbourne vs. Coe, 45 Fed., 822;
Ribon vs. Railroad Cos., 16 Wall., 450.

In the case of *Shields vs. Barrow,* Justice Curtis, after citing the case of *Russell vs. Clark's Executors,* 7 Cranch, 98, proceeds to classify parties to a bill in equity. He makes three classes of them: (1) formal parties; (2) persons having an interest in the controversy and who ought to be made parties in order that the court may act on that rule which requires it to decide on a final determination the entire controversy, and to do complete justice by adjusting all the rights involved in it; while such persons are commonly termed necessary parties, yet if their interests are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, they are not considered indispensable parties; (3) persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

In this last class certainly this case must fall, because the State not only has an interest in the controversy as to the removal of the Commission, who under the theory of the Circuit Court of Appeals, must be considered trustees, and as to the disposition of the fund, but its financial interest as to what shall be the surplus is of such a nature that a decree entered in the claim of complainants to these bills must of necessity affect its rights in and to the assets held by such trustees, for if it be conceded that the court may proceed to judgment to determine what is the just liability in this case of the State to these parties, the State cannot be concluded by such judgment unless such

trustees represent it to such an extent as to be in fact and in reality the agents of the State under statutory duty to defend the interests of the State. For, if the State can, as is admitted by the Circuit Court of Appeals, intervene and set up the defenses indicated in the return of the Commission, and set out in the opinion of the court, then the decree which would be rendered without such intervention would not be conclusive upon the State, because it had never had its day in court. If, then, such determination, in the absence of the State, is not conclusive upon it, it follows necessarily that before effect can be given to the judgment of the court the State should have been a party to the suit. The illustrations given by Mr. Justice Curtis in *Shields vs. Barrow* fully illustrate the necessity of the debtor, the State, being made a party to these suits.

(3) *Whether the Act of 1907 created a trust and divested the State of all control or disposal of the State Dispensary property.*

The Circuit Court of Appeals held that the State, through its Legislature, had passed the title and possession of the fund involved to the Commission for the purposes designated in the Act, the first of which was to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations, and that the fund being in the hands of the Commission charged with this duty, the State has no interest in so much thereof as is necessary to pay the just debts, and that no right of the State could be infringed to have the true amount of the debts due by the defunct Dispensary judicially ascertained by the court in these suits; that the fund in the hands of the Commission is, by virtue of the provisions of the Act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the funds in the hands of the Commission to the extent that

the debts are shown to be just, and that a judicial determination of the true amount of such debts can in no way affect the rights and interests of the State, the only interests of the State in the fund being, as declared in the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities, and that the fund in the hands of the Commission must be treated as a trust fund.

The contention, however, of the petitioners is that the Act of 1907 created a Commission to ascertain what were the just liabilities of the State towards certain persons who had been dealing with one of its institutions, and with officers who had been removed by its Chief Executive on the ground of illegal and improper conduct in creating the very claims to be investigated; that under the conditions existing it never was the intention of the Legislature to create any trust in their favor except such as might result after the Commission had made investigation and had determined their just liabilities; that the Legislature had no authority but to make such law in conformity with the Constitution of 1895, Article 17, Section 2, which reads:

"The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted,"

and that such section was also limited by a former section, Article 3, Section 30, of the Constitution, which declares that

"The General Assembly shall never * * * authorize payment or part payment of any claim under any contract not authorized by law. * * *"

The petitioners claim that the Act of 1907 is nothing but an Act which authorizes claimants to sue or to have their claims established against it, and to be paid out of a certain fund. Allowing such claims to be established and sued on could not be construed as admitting the validity of the claim.

Bank vs. State, 60 S. C., 465.

The statute books of the State contain instances where the Legislature has seen fit, instead of making the investigation through its own committees, to devolve this duty upon certain persons as Commissioners or upon regularly appointed tribunals. But no State decision has ever held that by such Act a contract was created between the State and the claimants, which disabled the Legislature from either modifying or repealing such statute.

Campbell vs. Sanders, 43 S. C., 577.

As an instance of the General Assembly prescribing a special mode of establishing and adjusting claims against the State, see Joint Resolution "providing mode of ascertaining the debt of the State, and of liquidating and settling the same." 16 Stats., 669. By this Joint Resolution a special court was established with a right of appeal to the Supreme Court of the State, and also of right of appeal by writ of error to the Supreme Court of the United States. One of the provisions of this Joint Resolution required that "all persons holding bonds or coupons of bonds, certificates of stock, or interest orders thereon, issued by this State since the 1st of January, 1866, before they could be entitled to the benefits of the Act, should present the same for examination before the person or persons appointed to examine the debts, liabilities and unfunded debt of the State, etc."

See, also, the establishment of a Court of Claims by an Act "To provide for the settlement of the unfunded debt of the State incurred before the 1st of November, 1876" (16 Stats., 555). This Court of Claims was to be held by a commissioner "for ascertaining all legal and just claims," and by an amendment to this Act the burden of proof was declared to be upon the claimant to establish the *bona fides* of the original consideration upon which the claim was based (16 Stats., 788).

As a further instance, see the Joint Resolution to raise a Commission to investigate the indebtedness of the State (16 Stats., 318). This Act is not dissimilar to that approved on the 24th of January, 1906, and entitled "An Act providing for

the investigation of the Dispensary." The several Commissions and Courts of Claims are discussed in the *Bond Debt Cases* (12 S. C., 200), and *Ex parte Childs,* 12 S. C., 111.

The Act of 1907 creating the Commission gives no right of appeal, nor does it contain the usual features of an Act creating a court, but the Legislature was under no legal obligation to provide either any form of proceedings or to create a court with the right of appeal to a court for the benefit of its debtors. The relation of creditor and debtor existing between the State and the vendor of whiskey, such vendor had only the moral obligation of the State to look to for the fulfillment of its contract. The State certainly had the power, therefore, to prescribe any conditions it saw fit upon which these claims should be presented and paid, or to shield itself behind its immunity entirely against the payment of the debts. But certainly the power of investigation given by the Act was judicial in its nature. No contract was made by the Act of 1907 or intended to be made.

The case of *South Carolina vs. Gaillard,* 101 U. S., 433, we think, is directly in point. The General Assembly of South Carolina passed on June 9, 1877, an Act entitled "An Act to provide for the mode of proving bills of the Bank of the State tendered for taxes and the rules of evidence applicable thereto." While this Act was of force, Trenholm, a holder of certain bills of the Bank of the State, in pursuance of the Act, tendered such bills to the treasurer of the county in payment of his taxes and contended that by complying with the provisions of the Act so as to allow the bills to be deposited with the Clerk of the Court to abide the result of the proceeding that might be instituted with regard to them, the State entered into a new contract with him, by which it agreed to accept the bills tendered by him in payment of his taxes if he established their validity in the way provided. The Act was repealed. The Supreme Court of the United States held that this Act of ~~1907~~ 1877 created no new contract between the State and the taxpayer or bill-holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank; and

that after the Act was repealed a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

If the Act of 1907 is nothing more than the creation of a Commission before which the State authorizes its creditors to sue and to have their claims established and adjusted, then it cannot amount to a contract irrevocable, and this Court has repeatedly so decided:

Beers vs. Arkansas, 20 How., 527;
Railroad vs. Tennessee, 101 U. S., 337;
Railroad vs. Alabama, 101 U. S., 832;
Hans vs. Louisiana, 134 U. S., 17;
Baltzer vs. North Carolina, 161 U. S., 245;
Ex Parte Alabama, 23 Am. Rep., 567.

In *In re Ayers*, 123 U. S., 507, it is said:

"Although the State may, at the inception of the contract, have consented as one of its conditions, to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense."

And in *DeSaussure vs. Gaillard*, 127 U. S., 216, it is said:

"It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid. If granted, the action is in substance, though not in name, an action against the State itself, just as an action permitted by the Acts of Congress on the subject against a collector of customs for the recovery of duties alleged to have been illegally exacted, and paid under protest, is an action against the United States, though nominally against the collector. In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject given by

its own judicial tribunals are conclusive upon the parties seeking the benefit of them."

The State by this Act expressly devolves the right and duty upon the Commission to investigate, determine and ascertain the just liabilities against it held by these claimants, and does not authorize suits to be brought against it to establish such liabilities either in its own courts or in the Federal courts.

In the late case of *Smith vs. Reeves*, 178 U. S., 436, the Court, in construing a statute of California, held that by such statute the State had not consented to be sued except in its own courts; that it was competent for the State to couple with its consent to be sued, on account of taxes alleged to have been exacted under illegal assessments made by the State board, the condition that the suit be brought in one of its own courts, and that the contention that the State could not restrict its consent to be sued to actions brought in its own courts was incorrect. See, also, *Chandler vs. Dix*, 194 U. S., 590; *Maury vs. Commonwealth*, 92 Va., 310.

The Circuit Judge, as well as the Circuit Court of Appeals, proceeds upon the idea that the alleged creditors had acquired some vested right under the Act of 1907, and that some special trust in their favor had been fixed upon the funds held by the State Dispensary Commission. These parties, it is true, had made out a statement of their claims, and had them presented to and filed with the Commission and a roster had been arranged and a day fixed for the hearing of the respective claims, a distinct understanding being had upon the presentation of their claims that the same would be later investigated in an orderly manner. When the claims were called they declined, however, to obey the legal orders of the Commission. By the terms of the Act itself, this Commission had all the powers conferred upon the committee appointed to investigate the affairs of the State Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, 1906, and one of the special powers given by Section 3 of that Act was the authority to require the production of any

and all books, papers or other documents or writings which they should deem relevant to any investigation, and to require the persons in possession of said books, papers, etc., to produce the same before the committee; and, by Section 5 of the Act, the Commission had the power to withhold the payment of any claim of any creditor against the State Dispensary which they should deem advisable until the same was duly proven by the production of the books of original entry, and of all documents and correspondence relating to all their transactions with the State Dispensary, and to require any person or persons in possession of said books, documents, papers and correspondence to produce the same before the Commission in person. Yet this express authority was denied by the claimants, and they refused to proceed in the manner prescribed by the very tribunal created by the General Assembly before which they should establish and have their claims adjusted.

Subsequent, however, to the institution of the suit the Legislature, on the 21st of February, 1908, amended the Act of February 16, 1907, which Act is attached to the petition herein, and which, it is submitted, creates a court and makes such provisions as entirely destroy any idea of a trust created in favor of the beneficiaries.

If, therefore, the Act of 1907 was not a contract, or of such nature as would prevent the Legislature from modifying or amending such Act as it pleases, then the Act of 1908, which was brought to the attention of the Court, has made such provisions as are absolutely inconsistent with any attempt on the part of any court, State or Federal, to assume jurisdiction to declare and adjudge the amounts due by the State to the claimants, and to administer the fund, except as therein provided for.

The Supreme Court of the State of South Carolina, on the 14th of March, 1908, and a short while subsequent to the interlocutory order granting injunction and appointing receivers, in the case of the *State, ex rel. Lyon, Attorney-General, vs. The State Dispensary Commission*, held, substantially, that the Act of 1907 creating the State Dispensary and the remedies

therein provided for, was a purely voluntary act on the part of the Legislature of the State, and was subject to be repealed, and the allowance of the remedies therein provided for subject to be recalled at any time at the pleasure of the Legislature and in its discretion; that the State Dispensary was as much a part of the State government and as subject to as full investigation and control as the State Treasury; that the State Dispensary Commission were officers and agents of the State, and that the funds in their hands were the property of the State and held by them as its officers, subject to the control of the Legislature; and the possession of the State Dispensary Commission is the possession of the State. The construction so placed upon the statute by the highest court of the State, if followed by this Court, would demand that the interlocutory orders made by the Circuit Court and affirmed by the Circuit Court of Appeals be vacated and the bills of complaint dismissed.

The rule laid down by this Court by one of its latest decisions is "The highest Court of the State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statute."

Batchel vs. Wilson, 204 U. S., 36.

We believe it sufficient to say, without a compilation of a vast number of citations, that the Federal courts will follow, in this case, the decision of the Supreme Court of the State of South Carolina construing the Act of 1907, unless this Court shall take the view that the Act of 1907 created a contract with the claimants, creditors of the State, which the State cannot, by subsequent legislation, interfere with.

Elmendorf vs. Taylor, 10 Wheat., 150;
Jefferson Branch Bank vs. Skelly, 1 Black, 436;
McCullough vs. Virginia, 172 U. S., 102;
Mobile Trans. Co. vs. Mobile, 187 U. S., 480;
Jack vs. Kansas, 199 U. S., 372;
Bacon vs. Texas, 163 U. S., 207;
Louisville Trust Co. vs. Cincinnati, 76 Fed., 296;
DeSaussure vs. Gaillard, 127 U. S., 216;
Lewis' Sutherland Stat. Constr., par. 313.

Where the Federal courts are not by rule bound to follow the decisions of the State courts in cases falling within the exception, they will consider such decisions upon the point in question and will incline to an agreement with the State courts.

Mead vs. Portland, 200 U. S., 163;
Blair vs. City of Chicago, 201 U. S., 400;
Copper Mining Co. vs. Territorial Board, etc., 206 U. S., 474;
Theological Seminary vs. Illinois, 188 U. S., 662;
Tampa Waterworks vs. Tampa, 199 U. S., 241;
Douglas vs. Kentucky, 168 U. S., 502.

The petitioners submit, finally:

That the fund in the hands of the Commission is property belonging to the State of South Carolina and in her possession, through her agents, the members of the Commission;

That these suits are, in effect, suits against the State, inasmuch as they must result in judgments being declared against the State upon contracts to which she is a party, and in the enforcement of such judgments taking away her property and applying it to the payment thereof; or else in judgments in her favor declaring these contracts void, or for less amounts than claimed;

That what is sought in these suits is not to require the Commission, as officers of the State, to perform duties imposed by the statute, but their purpose is to usurp the duties and functions of the Commission and to substitute in place of its judicial discretion that of the Circuit Court;

That if these be not suits against the State, then they are such proceedings that the State is a necessary or indispensable party thereto, without which the Court cannot proceed to judgment without necessarily and injuriously affecting the State in her financial interests and property rights. To protect this financial interest, and fulfill the duty imposed by the Constitution of preserving the net income arising from the past opera-

tions of this State department or institution—the State Dispensary—the State cannot stand idly by while the inquiry is proceeding and her funds being taken and applied to the payment of claims which she avers are illegal and fraudulent; but must, if she would perform her duty and protect her property, be forced into litigation upon the question of the validity and amount of the claims which it is alleged she owes to these whiskey houses.

J. FRASER LYON,
W. F. STEVENSON,
D. W. ROUNTREE,
B. L. ABNEY,
Counsel for Petitioners.

In the Supreme Court of the United States

October Term, 1908

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON et al. Petitioners,

vs.

WILSON DISTILLING COMPANY et al. and THE FLEISCHMANN COMPANY, Respondents.

Brief Against the Petition for Writ of Certiorari Submitted by T. Moultrie Mordecai, Frank Carter, Simeon Hyde and H. C. Chedester, Attorneys for Wilson Distilling Company, One of the Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON ET AL, *PETITIONERS.*

versus

WILSON DISTILLING COMPANY ET AL, and THE FLEISCHMAN COMPANY, *RESPONDENTS.*

BRIEF OF T. MOULTRIE MORDECAI, FRANK CARTER, SIMEON HYDE, AND H. C. CHEDESTER, ATTORNEYS FOR WILSON DISTILLING COMPANY, ONE OF THE RESPONDENTS SUBMITTED UPON APPLICATION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

The Respondents oppose the Application for Writ of Certiorari in this matter upon the following grounds:

1st. That the facts set forth in the Petition and Record do not justify it.

2nd: Because no question of importance is involved such as under the Practice, Rules and Decisions of this Court justify intervention by certiorari.

The Petitioners have set forth in their petition the facts upon which they rely for the Writ. As there is a difference between the Petitioners and Respondents as to what the facts are, we embody here a statement of these facts from the record.

STATEMENT OF FACTS.

In the year 1892 the General Assembly of South Carolina passed a Statute withdrawing from all its citizens the right to manufacture, sell, or otherwise deal in intoxicating liquors of all kinds, and undertook the conduct and manage-

ment of the business itself under a system known as the "State Dispensary."

By that Act, a Board of Control was established, consisting of the Governor, the Comptroller General and the Attorney General. To this Board was committed the duty and upon it was placed the responsibility of the conduct and management of the liquor business in South Carolina.

It is not necessary to recite this Act more fully. The purpose in referring to it is simply to state the composition of the Board which, at that time, was vested with the powers mentioned.

(Vol. 21, Statutes, page 62.)

It may be of importance to mention here that in the inception of this system the sum of fifty thousand dollars was appropriated by the State to constitute the first capital of the Institution, which amount has long since been repaid to the State and no further appropriation has at any time since been made.

In the year 1896, Vol. 22, page 124, the Constitution of the State Board of Control was changed so that it would consist thereafter of five members to be elected by the General Assembly; each of these members was required to give a bond of Ten Thousand Dollars and the entire liquor business was to be conducted and controlled by them.

They were to furnish liquors for sale to the County Dispensers, who were to remit the net proceeds of such sale to the State Treasurer. The bills for the purchases of liquor were to be paid by the State Treasurer, upon warrants drawn by the Commissioner, who was to be elected by the State Board of Control.

So the law stood until 1907 and it will readily be seen that the tendency was steadily towards the surrender on the part of the State of the management of the business and control of the affairs of the State Dispensary.

In that year, 1907, the General Assembly passed a Statute entitled "An Act to Declare the Law in reference to and to regulate the Manufacture, Sale, Use, Consumption, Possession, Transportation and Disposition of Alcoholic Liquors and Beverages within the State and to Police the same." By

the 47th Section of this Statute "the State Dispensary is hereby Abolished," and "all Acts and parts of Acts inconsistent with this Act are hereby repealed."

Taking this Section in connection with the history of the Dispensary Law and the management of the dispensary as hereinbefore stated, it appears that it was the Legislative purpose and intention to sever the State Dispensary from the State and to be done with it.

Possibly some history of the Dispensary and an investigation of its affairs and the scandals to which it had given rise, and the alleged corruption of which it had been the center, supplied the reason for this legislative action, and it is written in the Statutes of the State and the Proceedings before this Court that the State had reached a point when its further connection with the State Dispensary, as such, was to cease and determine.

The Statute last cited was approved on the 16th day of February, 1907. At the same session of the Legislature by an Act approved on the same day, entitled "An Act to provide for the Disposition of all Property connected with the State Dispensary and to wind up its affairs," a commission was created, to consist of five members and to be appointed by the Governor, to be known as The State Dispensary Commission.

Each of the members was required to give bond in the sum of $10,000. After providing how the commission should organize it is given authority and it is made its duty "to close out the entire business and property of the State Dispensary except real estate, and out of the proceeds of such sales and from the collection of debts due the dispensary, the commissioners are to pay all just liabilities at the earliest date practicable, and shall have the power to make such disposition of the stock on hand as their judgment may dictate," with certain other provisions not necessary to recite.

Realizing that after the payment of the debts of the institution there would probably be a balance remaining in the State Treasury, the result of the remittances made by the county dispensaries under the former law, it is provided in

Section 5, of this last named Act, "the said Commission shall pay to the State Treasurer, after deducting their compensations, and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities."

The Commission proceeded to sell all of the property except the real estate and to collect all assets due the State Dispensary, but having failed to pay out of the proceeds of such sales and collections the debts due to the complainants and others, these proceedings were filed.

A brief statement of the pleadings is necessary.

In the Wilson proceeding, after the formal allegations and the allegation of the indebtedness, by reason of sales made to the State Dispensary (see folios 2-6 of the record) it is alleged, in the language of the Statute last referred to, that "it was the duty of the Commission to close out the entire business and property," etc., and "to pay all the just liabilities of the Dispensary." A further allegation is that the Commission had realized upon these assets, but it failed and refused to pay complainant's debt, alleging that the assets were not sufficient to pay all of the debts of the Dispensary, and it is particularly alleged that the Commission proposes and will, unless restrained by order of the Court, put the funds in their hands into the State Treasury, thus depriving the complainants of their rights in the premises.

The answer to this complaint, after denying the allegations last above referred to, raised the questions that the Commission constituted a Court, and that this Court is without jurisdiction to control or restrain their action and also that they, the Commission, are officers of the State and that this action is to all intents and purposes a suit against the State, and that the State is an indispensable party.

The complaint in the Fleischman case alleged at greater length practically the same conditions as in the Wilson case. It is not necessary to abstract them, further than to say that reliance is placed upon the same Section of the Winding Up Statute as is referred to in the Wilson case.

The answer in the Fleischman case so far as the present hearing is concerned, raises the same questions, but with more particularity as to the position taken that the Commis-

sion constituted a court in that it is alleged at folio 68, that "to restrain the action of the Commission by the issuance of the injunction prayed for, would be in violation of Section 720 of the Revised Statutes of the United States."

The Circuit Judge issued a temporary injunction and rule to show cause, which was made permanent by his decree, dated March 3rd, 1908 (see Record Folios, 126 et seq).

The Legislature of South Carolina on February 24th, 1908, passed an Act directing the State Dispensary Commissioners to pay out of any funds in its hands from the profit or business of the State Dispensary, Fifteen Thousand Dollars ($15.-000.00), into the State Treasury, to be used for the purposes mentioned in the Act. The Commissioners having refused to pay this amount because of the Restraining Order issued in this proceeding by Judge Pritchard, on March 4th, 1908, a proceeding was instituted in the Supreme Court of South Carolina by the Attorney General of the State seeking to compel the payment of this money by Mandamus directed to the Commissioners. The Commissioners showed for Cause why the Writ should not issue, the pendency of this proceeding in the Circuit Court, and that they were restrained by the Order therein from paying out the funds, attaching to their answer a copy of the Bills and of the Restraining Order.

Thereupon the Supreme Court of South Carolina, upon the coming in of the Return and after argument, held that the suits in the Circuit Court were suits against the State and that the State was an indispensable and necessary party and the Act of February 16th, 1907, set out in the Petitioner's brief, did not create a trust and that the funds in the custody of the Commissioners were the property of the State, and in the hands of the Commissioners as the Agents of the State, and subject to legislative control under appropriation, and that the Order of the Circuit Court in these proceedings was void, as the Court was without jurisdiction in the premises, and that there was no reason why the Mandamus should not issue.

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, and after hearing full argument, that

Court sustained the judgment of the Circuit Court and remanded the Case for further proceedings in connection with the views therein expressed.

The points decided were:

First: That the suits in the Circuit Court were not suits against the State.

Second: That the State was not an indispensable party.

Third: That the Winding-up Commission created by the Act of 1907 did not constitute a Court, and the Court held, therefore, that the Decree of the Circuit Court appealed from should be affirmed and the case remanded for such further proceedings as might be in accordance with the terms expressed in the opinion.

ARGUMENT.

Conceding that the Supreme Court has power in certain cases to issue the Writ prayed for in this proceeding, even when the Appeal is from an interlocutory order of the Circuit Court, we call the attention of the Court to the well settled rule that such a Writ will only be issued in cases strongly requiring the exercise of this extraordinary power.

In the *American Construction Co. against Jacksonville, etc., R. R.*, 148 *United States*, 372, all the Acts of Congress with reference to the jurisdiction of the United States Courts in such matters are fully considered, and the Court says:

> "Accordingly, while there have been many applications to this court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted: the one in Lau Ow Bew's Case above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the District Judge and was dissented from by one of the three Circuit Judges, and in each of those cases the Circuit Court of Appeals had declined to certify the question to this court.

"There are much stronger reasons against the interposition of this court to review a decree made by the Circuit Court of Appeals, on an appeal from an interlocutory order, than in the case of a final decree. Before the Act of 1891, as has been seen, no interlocutory order was subject to appeal, except as involved in an appeal from a final decree. The only appeal from an interlocutory order under the Act of 1891 is that allowed by section 7 to the Circuit Court of Appeals, the same court to which an appeal lies from the final decree. The question whether a decree is an interlocutory or a final one is often nice and difficult, as appears by the cases collected in Keystone Co. v. Martin, 132 U. S., 91, and in McGourkey v. Toledo & Ohio Central Railway, 146 U. S., 536. Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right, and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters.

"Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

No further citation of authority would seem to be necessary to sustain the proposition that only in very rare cases will the power invoked in this proceeding be exercised, but we shall refer briefly to some of the other cases where the question has been considered and decided.

In Fields against the United States, 205 *United States*, 203, only three cases are recognized in which certiorari will lie. First, where the case is one of gravity; second, where there is a conflict between the decisions of State and Federal Courts, or between Federal Courts of different circuits; third, where the relation of the United States to foreign nations is involved, or where the case is one of general interest to the public.

Under the facts of the case now before the Court, none of the rules apply, as we shall hereafter show.

In Forsythe against Hammond, 166 U. S., 506, Mr. Justice Brewer construed the Acts of Congress relating to this subject, and holds that "this Court has power under the Act of 1891 to grant a Writ of Certiorari," "but," he says, "obviously a power so broad and comprehensive, if carelessly used, would defeat the very thought and purpose of the Act creating the courts of appeal. To exercise it might burden the docket of the court with cases which it was the intention of Congress to determine in the Courts of Appeal and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice. So it has been that the Court, while owning this power, has been chary of acting in respect to certiorari.

It is said "it is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instructions, and it is only when such questions are involved that the power of this Court to require a case, in which the judgment and decree of the Court of Appeals is not final, to be certified, can be properly invoked."

The cases cited in the foregoing opinion and also in *American Construction Co. v. Jacksonville Railway Company,* 148 *U. S.,* 383 (the only cases in which this power has been exercised) may be briefly considered.

In Re Lau Ow Bew, Petitioner, 141 *U. S.,* 583: It appears in this case that the matter in controversy in the Circuit Court of Appeals was the construction of the Chinese Restrictive Acts and their relation to the treaty between the United States and China, and the matter in dispute was whether a Chinese merchant domiciled in the United States who temporarily leaves this country for the purpose of business or pleasure, *animo revertendi,* is such a question of importance as would require the interference of the Supreme Court by certiorari, and when this same case came again before the Supreme Court upon the hearing of certiorari the power to issue the writ was again recognized and in view of the gravity and importance of the questions involved,

questions concerning a treaty between this country and a foreign power, the court considered and decided the controversy.

In Re Woods, 143 *U. S.*, 203. In that case the Writ was refused. It was a case in which it was sought to bring up a record by certiorari in order to determine the question whether the law respecting the liability of a master to his servant for injuries received in the course of his employment had been properly applied. The language of Chief Justice Fuller in delivering the opinion of the Court is suggestive as to the question involved in the present application. Said he: "But in the interest of jurisprudence and uniformity of decisions, to use the language of the eminent jurist and statesman who had charge of the Bill, 'provision was made in Section 6, for such supervision on our part as would tend to arrest diversity of judgment and guard against inadvertence of conclusion in controversies involving serious questions.'"

We have thus traced the rule as to the limitation placed by this court upon the exercise of its power in this regard, back from the later to the earlier cases, and have reached in this last citation the origin of the rule.

The power this placed in the Supreme Court will only be exercised to avoid the result of inadvertence on the part of the Circuit Court of Appeals in determining questions of gravity and importance, or preventing adversity of decision.

The only ground upon which this application can really be said to rest is that there is a conflict of decision between the State Supreme Court and the Circuit Court and Court of Appeals and the attempt is made to bring this case within the rule laid down, *supra*, by this court, that where such conflict exists this court will bring up the record and review the decision of the Circuit Court of Appeals.

Let us see how this conflict arose.

A reference to the statement of facts and to the record will show that after the proceedings in this case and after a preliminary injunction had been issued by the Circuit Judge an action was begun in the State Court by the Attorney General of the State, against the defendants constituting a commission to wind up the affairs of the dispensary, in order to obtain from the State Supreme Court an order directing the

payment by the latter of a certain sum of money appropriated from the dispensary funds by the legislature.

Now it is clear that the evident purpose of this action on the part of the authorities of the State was to obtain the construction of the various statutes hereinbefore referred to so far as such construction bore upon the questions before the Circuit Court in these proceedings and the State Court having concluded, as shown by the record, that the State was an indispensable party to any proceeding concerning the dispensary fund, it was sought to forestall the decision of the Circuit Court by that construction of the State Statute.

Inasmuch as one of the cases in which the right to *certiorari* on appeal from an interlocutory order, is based upon an alleged confusion between the decisions of the State and Federal Courts, and inasmuch as the petition in this case strongly urges that such confusion exists, we submit that the petitioners are not entitled to the writ, because whatever confusion or conflict has arisen and now exists between the State and Federal decisions is of their own procurement. They cannot, therefore, be in a position to invoke this writ because of this conflict of decision and the confusion which might arise therefrom in the sense in which it was invoked in the cases referred to in which the writ was granted.

As incidental to this question we take up now the discussion of the question whether the U. S. Courts are bound in this proceeding to follow the decision of the State Supreme Court rendered in a case instituted after this proceeding was begun, and after the questions involved had been passed upon by the United States Circuit Court in such proceeding.

In considering this question when presented to him, Judge Pritchard, at page 299 of the record, held as follows:

> "The Court having considered the opinion of the Supreme Court of South Carolina, which holds that this is a suit against the State and therefore inhibited by the Eleventh Amendment, is of the opinion that this Court is not bound by the principles enunciated therein,

inasmuch as it was rendered subsequent to the decision of this Court and necessarily involves a construction of the Constitution of the United States."

In this connection we submit in addition to this that the present controversy also involves the construction or at least the determination of the question as to what constitutes a court under Section 720 of the Revised Statutes of the United States, so that there are practically two Federal questions involved, besides the construction of the State Statute.

The Circuit Judge relied upon two leading authorities, one of which is *Burgess against Seligman*, 107 U. S., page 33, from which he quotes as follows:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the Statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts are co-ordinate with, and not subordinate to, the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the Statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon and which we are now called upon to consider. It can hardly be contended that the

> Federal Court was to wait for the State Courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed, merely because the State Court has since adopted a different view."

And also the case of Pease against Peck, 18 Rwy., 599, where the Court says:

> "When the decisions of the State Court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also when a cause is got up in a State Court for the very purpose of anticipating our decision of a question known to be pending in this Court. Nor do we feel bound in any case in which a point is first raised in the Courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of the State."

The case in 107 U. S. has been followed by a very large number of cases both in the Circuit Courts and the Supreme Court of the United States, and some of the decisions of the Supreme Court will be referred it.

In *Louisville & Nashville R. R. Co. against Palmes,* 109 U. S., p. 244, it was held that the Federal question before the Court is whether the State Court gave effect to a State law which impairs the obligations of a contract; in deciding which, and in determining whether there was a contract, the Court is not necessarily governed by previous decisions of State Courts except where they have been so firmly established as to constitute a rule of property.

Said the Court (page 257):

> "It is undoubtedly true that the opinion of the Supreme Court of Florida in the case of Gonzales v. Sullivan, 16 Fla., 791, is not consistent with that which we have expressed upon some of the principal questions involved in this case. It did declare, speaking of the effect of the Internal Improvement Act of 1855, 'that an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the road itself, and not to the companies', and that by the act of 1872 the Pensacola and Louisville Railroad Company, as assignee of the Florida and Alabama Railroad, became entitled to the exemption, because 'the property passed, and with it, as an incident, went the exemption.'"

In *Buncombe County against Tommey*, 115 U. S., 122, the question arose as to whether a mechanic's lien could be enforced upon railroad property under the Statute law of North Carolina. While the particular Statute had never been finally construed by the Supreme Court of North Carolina, nevertheless that Court had given construction to it to the extent of a very clear indication of an opinion and the Supreme Court said:

> "But without accepting as conclusive an opinion delivered after the rights of the parties had become fixed (*citing Burgess against Seligman, supra*), we rest our interpretation of the Statute upon the ground that it has no reference to the work done, or materials furnished in the construction of railroads."

In another case in the same volume, 115 U. S., *Gibson v. Lyon*, at page 439, the Court says:

> "As a precedent the decision of the Supreme Court of the State, though single, is entitled to peculiar respect because of the questions decided arising upon the local law of the State, but it cannot have conclusive force in

the courts of the United States unless it has become a rule of property."

In Carroll County against Smith, 111 *U. S.*, 557, it was held that "the decision of the highest court of a State construing the State's Constitution is not binding upon this Court, as affecting the rights of citizens of other States in litigation here when it is in conflict with previous decisions of this court and when the rights which it affects here were acquired before it was made."

Said the Court:

> "The decision in *Hawkins v. Carroll County*, above referred to is not a judgment of the Supreme Court of Mississippi construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, *pronounced after the controversy arose*, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts to determine for themselves what is the law of the State by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. Burgess v. Seligman, 107 U. S., 20, 30."

In Anderson against Santa Anna, 110 U. S., 356, the question arose upon the construction of the laws under which municipal corporations in a State were allowed to incur indebted-

ness and it was held "that where bonds were issued under the laws which had not at the time of issue been construed by the highest court of the State, its subsequent construction by them, is not conclusive on Federal Courts, though they will lean to an agreement of views with the State Court."

In this case the decision in the Burgess case, in 107 U. S., was referred to as having summed up all of the authorities up to that time and laid down the rule thus adopted in this case, that the United States Courts will not necessarily follow the decisions of State Courts made after the time of the transaction which is the subject of litigations.

In *Bolles v. Brimfield*, 120 *U. S.*, 759, citing *Anderson v. Santa Anna, supra*, the court says: It adheres to the rule upon the subject of following judgments of State Courts, with the qualification, however, that such doctrines may be announced by the State Court before the rights which are the subject of litigation in the Federal Court, accrues.

In *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555, the question arose upon a Statute of the State of Massachusetts providing that a person engaged in traveling on the Sabbath Day could not recover against a corporation upon whose road he travels, for personal injury, which had been sustained by the decisions of Massachusetts in a large number of cases which were of sufficiently long standing to establish a rule, so far as they can establish it, and the Supreme Court followed the rule simply for those reasons, and even in this case there was a dissent by Mr. Justice Harlan, in which Mr. Justice Field concurred.

In *German Savings Bank against Franklin County*, 128 U. S., 526, the State law made a certain provision with reference to municipal bonds issued by a County and the State Courts had construed the law. In passing upon the question whether the Supreme Court should follow these decisions, the Court says:

> "This interpretation of Section 7 of the Act of April 16th, 1867, accompanied all bonds subsequently issued, into the hands of whoever took them, whether a *bona fide* holder or not, and this Court must recognize this de-

> cision of the Supreme Court of Illinois as an authoritative construction of the Statute made *before* the bonds were issued and to be followed by this Court." Citing a number of cases in which that principle was sustained.

Thus the principle is again emphasized that where the State law has been construed *before* the transaction occurs, and the parties have acted upon the faith of that decision, then the Supreme Court of the United States will not disturb that construction.

In considering the effect of a construction of a devise, the Supreme Court in Barker vs. Pittsburg, etc., R. R. Co., 166 U. S., page 83, says:

> "It becomes important, therefore, that the opinion of the Supreme Court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that Court."

The rule with reference to following the State Court when its decisions upon a point are numerous and settled and a rule of property is concerned is again considered in *Wade v. Travis Co.*, 174 U. S., 499, and to illustrate how faithfully the Supreme Court has adhered to the rule laid down in 107th U. S. and other cases, while a single decision made *after* a transaction will not always be followed, the rule is applied in a reversed state of the facts, in this, that having followed the Supreme Court of Illinois (20 Howard 1) in a line of decisions which settled a rule of property the Supreme Court adhered to that rule, although the Supreme Court of the State had subsequently overruled its own decision and had given the Act of the Legislature a different construction.

In a very full discussion of the rule in *Warburton v. White*, 176 U. S., 495, the result deduced is that there is no absolutely fixed rule which requires the Supreme Court of the United States to follow the decision of the State Court in considering a State Statute.

It was said that if the acts done were done in pursuance of the construction by the State Court, and such construction

had become a fixed rule of action or of property, the United States Court would follow it; but if not, the United States Court would not be relieved of the responsibility of putting its own interpretation upon the Statute.

In *Flanigan v. Sierra County*, 196 U. S., 553, it was held:

Whether a Statute of a State is, or is not, a revenue measure and how rights thereunder are affected by a repealing Statute, depends upon the construction of the Statutes, and where no Federal question exists, this court will lean to an agreement with the State Court.

In that case there was a conflict between the Supreme Court of California and the Circuit Court of Appeals, and the contention was that the conflict did not arise out of the construction of the Statute of the State, but as to the effect of the new Statute, considered by each court to be a repeal of a prior Statute, upon the rights of the litigants granted under a prior Statute.

The Circuit Court of Appeals first assumed, but did not decide that the Ordinance may have been a revenue measure, and the Supreme Court of California decided that the ordinance was a revenue measure.

It was contended that this question did not involve the construction of the Statute; but was merely the determination of a question that depended upon a principle of general law and not upon a positive Statute of the State. This being the contention of counsel, it was further said that: "In such case the courts of the United States are not required to follow the decision of the State Courts.

The court declined to adopt this view and went on to say:

> "If in any case we should lean to an agreement with the State Court, this is such a case. There is no Federal right involved. The question is one strictly of the State law, and the power of one of the municipalities of the State under that law. If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it."

So that even in that case the court decided that it was not bound to follow the decision of the State Court.

Finally, as showing the attitude of the Supreme Court to this question, we cite *Yazoo & Miss. Valley R. R. vs. Adams*, 181 U. S., 580.

In that case the question arose upon the construction of the State Statute with reference to the collection of taxes and that the Supreme Court of Mississippi having decided that all the taxes had accrued after the consolidation of certain roads and the company had thereby lost its exemption, and as this was the construction of the general tax laws of the State which were complex and difficult of interpretation, this Court would accept that construction and deny the petition for a rehearing.

This is very far from holding that the court will in all cases adopt the construction of the State Statute by the Supreme Court of the State; and in delivering the opinion of the court Mr. Justice Brown said:

> "Assuming that we may exercise an independent judgment respecting their (Statutes) construction, the examination we have given them leaves us in great doubt, whether the argument that the taxes had accrued prior to the consolidation is a sound one or not. The right asserted depends upon comparison and construction of such statutes; and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the State Statute which has been adopted by the court of last resort in that State."

Putting this last rule along side of the decisions in the Burgess case, *supra*, and other decisions which we have cited, it would seem that there would be no reason why the decision of the State Court should be followed, where it has been made not only after the rights have accrued, which are the subject of litigation, but also after a contrary interpretation by the courts of the United States.

UPON THE MERITS.

We take up the discussion of the questions raised in the petition and brief of the petitioners upon the merit of the controversy.

Three propositions are submitted by the petitioners:

First: Whether the suits in the Circuit Court are suits against the State?

Second: Whether the State is an indispensable party to such suits in such sense that the Court cannot proceed to judgment without materially affecting its rights and interest in the fund?

Third: Whether the Act of 1907 created a trust and divested the State of all control or disposition of the dispensary property?

FIRST.

Upon the first proposition we submit the following discussion with the authorities applicable to the question:

These are Not Suits Against the State.

We shall next discuss the question whether these are in reality suits against the State or only against the Commissioners named as defendants.

The attempt is not made here in any way to frustrate the purpose of the State in passing the legislation under discussion, nor to force the officers in charge of the fund, whatever may be their relation to the State, to do any act not contemplated by the Statutes. The decisions cited upon both sides of the question now being discussed while apparently opposed, are easily reconcilable when it is remembered that in one class of cases the effort was made to force certain officers to do what they were commanded by statute not to do, and in the other class of cases the purpose was to have carried out, through the agencies therein provided, that which the Statute enjoined and required.

It is to this latter class of cases that the proceedings, now

before this Court, belong and this position is fully justified by an examination of the pleadings in the case.

After reciting the provisions of the Statute and the debts incurred and the failure to pay the debts the complaints in both cases, allege that the debt is justly due and in the Fleischman case the allegation is made at length, and with great particularity, that the claim has been passed upon by the Commission, that the amounts allowed are practically correct, and that notwithstanding this ascertainment as to the justness of the claim and the validity of the obligation, the defendants refuse to pay it.

In other words, if there be any duty imposed upon the commission of a *quasi* judicial nature, involving any discretion, they have already exercised it, and to that extent, that is to the extent of its duty to the State, has performed it, and the only other duty remaining undone is the duty to the complainants and it is to enforce the performance of that duty to the complainants, the State thus being out of the question, the duty to it having been performed, that these proceedings are brought. Such being the case the authorities apply to which we shall hereafter refer, and which are referred to fully in the decision by the Supreme Court of South Carolina, and the Circuit Court, and which need not all be referred to here, to the effect that the State is not an indispensable party in such a proceeding and that the court has jurisdiction to proceed without it.

The two cases most often cited in support of the several propositions taken by the respective parties are *Louisiana* v. *Jumel*, 107 U. S., 711, *and Rolston* v. *Missouri*, 120 U. S., 390.

The decision in the Jumel case was based upon the fact that an ordinance forbade the payment of certain interest and withdrew from the officers of the State the means of carrying her contract into effect, and that the execution of the contract cannot be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against the officers who are merely obeying the positive orders of the supreme political power of the State.

On the other hand, in the Rolston case, the Court said:

"The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made the trustees are entitled to their decree; if it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the court and the suit is in equity, it may be restrained so as to determine what the trustees must do in order to fulfil the law, and under what circumstances the governor can be compelled to execute the assignment which has been provided for."

The same principle is laid down in many other cases cited in the decree below.

First of all, the case of *Osborne against the United States Bank*, 9 *Wheaton*, 739. In that case the suit was against the officer and was sustained for the very reason that the State could not be made a party under the Eleventh Amendment.

Here the subject matter was notes and money wrongfully withheld and it was held that the prohibition of the Eleventh Amendment does not extend to cases where the State is not a party on the record, though it may have an ultimate interest in the subject matter.

Referring again to the issues raised in hese proceedings and the condition in which the matter is before the court, so that with reference to these claims there is no exercise of discretion required on the part of defendant, we cite the "*Board of Liquidation against McComb*," 92 U. S., 531, where it was held that "although a State without its consent can not be sued by an individual; nor can a court substitute its own discretion for that of the executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed, and the performance is refused, any person will sustain injury by such refusal, may have a *mandamus* to compel its performance."

Again, it must be distinctly borne in mind throughout this discussion that the purpose of both proceedings now before the court was principally to prevent the distribution of the funds without discharging the plain obligation to the plain-

tiffs due them from the commission, and this was not seeking to defeat the purposes of the statutes, but rather to carry out that purpose fully and expeditiously and fairly.

Pennoyer against McConnaughy, 140 U. S. 1: In this case the plaintiff had certain contract rights from the State which were threatened to be invaded by the Land Commissioner, an officer of the State having in charge all land interests of the State, under an Act which was claimed to be unconstitutional, and the question was raised that the suit was really against the State although nominally against the Land Agent, and the court held that it was not, but that it might proceed against the Land Commissioner.

In the opinion Mr. Justice Lamar divides the cases in which this question has arisen into two classes, the first of which "is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts "and the other class is where a suit is brought against defendants who claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under contract with the State.

> "Such suit, whether brought to recover money or property in the hands of such defendant, unlawfully taken by them in behalf of the State, or for compensation in damages or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State."

Citing *Osborne against the Bank, 9th Wheaton,* 738; *Davis against Gray,* 16 *Wallace,* 203; *Thomlinson vs. Branch,* 15 *Wallace,* 460; *Litchfield vs. Webster County,* 101 U. S., 773; *Allen vs. Baltimore, etc., R. R.,* 114 U. S., 311; *Board Liquidation vs. McComb,* 92 *U. S.,* 531; *Poindexter vs. Greenhow,* 114 U. S., 270.

Many of these authorities are cited in the later cases and are also cited in the opinion of the Supreme Court of South Carolina and of the Circuit Judge, and the principle runs all through them, that where the purpose of the proceeding runs along with the purpose of the State (as shown in its legislation), mandamus, or injunction, as the case may be, will lie to enforce a right or prevent a wrong, and that such proceeding will lie against the officer whose duty it is, under a Statute, to do the thing required, or not to do the thing sought to be enjoined.

It will serve no good purpose to prolong the discussion quoting at length all of these authorities, familiar to the court and recently made very familiar to counsel by reason of the repeated discussion of these questions, and we shall refer only to a few more.

In the case of *Tindall* v. *Wesley, in* 167 U. S., is precisely in point, even taking in view that the property in question in this case is the property of the State, strictly speaking.

Wesley, the plaintiff, claimed to be the owner of certain real estate in the City of Columbia, which was also claimed by South Carolina as its property, and was in the custody of the Secretary of State of South Carolina, who by law is the custodian of all state property.

The actual possession of the real estate in question was in another who was simply a watchman under the Secretary of State. Both defendants disclaimed any personal interest in the property and averred that the title and right of possession were in the State. In that case the question was distinctly raised that the suit was against the State within the meaning of the Eleventh Amendment and it was held that it was not a suit against the State, but simply an action to recover against those who were in possession of the property, and it was held that the Eleventh Amendment gave no immunity to officers or agents of States, in withholding the property of a citizen without authority of law, and when such officers or agents asserted that they are in rightful possession, they must make that assertion good upon it appearing, in a suit against them as individuals, that the legal title and right of possession are in the plaintiff.

In this case special reference is made to the case of *United States* v. *Lee*, 106 U. S., p. 218, and it is stated that the same principles apply as are enforced in cases in which the United States is a party.

In the latter case the doctrine that except where Congress has provided, the United States cannot be sued, was reaffirmed, but it as held that it had no applicatoin to officers and agents of the United States, who, as such, holding for public uses possession of property, are sued therefor by a person claiming to the owner thereof, or entitled thereto; but the lawfulness of that position, and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject matter of inquiry, and be adjudicated accordingly.

Here again many authorities are cited in support of the decision, and the same distinction clearly drawn.

Bearing in mind that the position we take is that these proceedings seek to require the performance of statutory duties enjoined upon the commission by injunction, that the fund may be kept intact for the purpose of carrying out the statute, the case last cited is very strong.

Said the Court:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of citizens, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however, clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, *to examine whether this authority is right-*

fully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that he parties setting up such auhority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such auhority forbids any inquiry into the truth of the suggestion."

We call the attention of the court to the following cases, in further support of the position we have endeavored to maintain:

We refer particularly to the following very recent case:

In the Matter of Edward T. Young, Petitioner on Petition for Writ of Habeas Corpus and Certiorari.

(*Decided March* 23, 1908.)

In that case the State of Minnesota had passed a law imposing penalties upon railroad corporations and officers for violating certain freight rates, so severe that the court declared the regulations violative of the provisions of the Constitution of the United States, guaranteeing the equal protection of the laws. Pending the proceedings a temporary injunction was served upon certain officers of the State restraining them from attempting to enforce the law in question. This temporary injunction was served upon the Attorney General of the State, among others, and he appeared specially to move to set it aside, upon the ground that the Court had no jurisdiction over him as Attorney General, and that the suit was in reality against the State of Minnesota, which had not given its consent to such proceeding, and that therefore the court was without jurisdiction.

The Attorney General also demurred to the bill on the same grounds. The court overruled the motion and demurrer, and subsequently granted a preliminary injunction. The Attorney General, notwithstanding the injunction, proceeded to enforce the law and was fined for a contempt.

The matter then came before the Supreme Court of the United States on an application for habeas corpus and writ of certiorari.

Mr. Justice Peckham delivered the opinion of the court and reviewed all the authorities on the questions, whether this was a proceeding against the State prohibited by the Eleventh Amendment.

The petitions were dismissed—the court holding, among other things, as follows:

> "The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans v. Louisiana*, 134 *U. S.*, 1. It was adopted after the decision of this Court in *Chisolm v. Georgia*, 2 *Dall.*, 419 (A. D. 1793), where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this Court involving the Eleventh Amendment, among them being *Osborne v. United States Bank*, 9 *Wheat.*, 738, 846, 857 (A. D. 1824), which held that the Amendment applied only to those suits in which the State was a party on the record.
>
> "In the subsequent case of *Governor of Georgia v. Madrazo*, 1 *Pet.*, 110, 122, 123 (A. D. 1828), that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn*

v. United States Bank, supra, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as Governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the State government), the State might be considered as a party on the record (p. 123), and therefore the suit could not be maintained.

"*Davis v. Gray*, 16 *Wall*, 203, 220, reiterates the rule of *Osborn v. United States Bank*, so far as concerns the right to enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"In *Virginia Coupon Cases*, 114 U. S., 270, 296, (Poindexter v. Greenhow), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a tax payer for non-payment of his taxes, was a suit against him personally as a wrong-doer and not against the State.

"'*Hagood v. Southern*, 117 U. S., 52-67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and although the State was not in name made a party defendant, yet being the actual party to the alleged contract the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.

"The cases upon the subject were reviewed, and it was held, *in re Ayers*, 123 U. S., 443, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a per-

formance by the State, of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood v. Southern, supra.*

"A suit of such nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constitute such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

"On the other hand *United States v. Lee,* 106 U. S., 196, determined that an individual in possession of real estate under the government of the U. S., which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also *Tindal v. Wesley,* 167 U. S., 204, to the same effect.

"In *Pennoyer v. McConnaughy,* 140 U. S., 1, 9, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainant's contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborn v. United States Bank, supra,* was cited, and it was stated: 'But the general doctrine of Osborn v. Bank of the United States, that the Circuit Courts of the United States will restrain a State Officer from executing and unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.' The same principle is decided in *Scott v. Donald,* 165 U. S., 58-67. And see *Missouri, &c., v. Missouri Railroad Commissioners,* 183. U. S., 53.

"The cases above cited do not include one exactly like this under discussion. They serve to illustrate the prin-

ciples upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayers* case, 123 U. S. (supra), was to restrain the State officers from commencing suits under the act of May 12, 1887 alleged to be unconstitutional), in the name of the State and brought to *recover taxes for its use*, on the ground that if such suits were commenced, they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself would not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

"Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas) and the attorney general, all of whom were held suable, and that such suit was not one against the State. The commission was enjoined from enforcing the rates it had established under the act, and the attorney general was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the commision under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the commission as defendant. This court held that such language permitted a suit in the United States Circuit Court for Western District of Texas, which embraced Travis

County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the attorney general was enjoined), and therefore not prohibited under the amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the objection to the jurisdiction of the Circuit Court was not tenable whether that jurisdiction was rested (page 393) 'upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the U. S.' Each of these grounds is effective and both are of equal force. *Union Pacific, &c. v. Mason Company*, 199 U. S., 160-166.

"In *Smyth v. Ames*, 169, *U. S.*, 466 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the State, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the State, it was said, 'It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rate being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment."

"There was no special provision in the statute as to rates, making it the duty of the attorney general to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. *State of Nebraska ex rel, &c. v. The Fremont, &c., Railroad Co., 22 Neb.*, 313.

"The final decree enjoined the attorney general from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of enforcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual State officers for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

"This decision was reaffirmed in Prout v. Starr, 188 U. S., 537, 542.

"Attention is also directed to the case of *Missouri, &c. Ray. Co. v. Missouri R. R., &c., Commissioners*, 283 U. S., 53. That was a suit brought in a State Court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against te railroad company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri River. The defendant sought to remove the case to the Federal Court, which the plaintiffs resisted, and the State Court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this court held that the State was not the real party plaintiff, and the case had, therefore, been properly removed from the State Court, whose judgment was thereupon reversed.

"Applying the same principles of construction to the removal act which had been applied to the Eleventh Amendment, it was said by this court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

"Although the case is one arising under the removal act and does not involve the Eleventh Amendment, it, nevertheless, illustrates the question now before us, and reiterates the doctrine that the State is not a party to a suit simply because the State railroad commission is such party.

"The doctrine of *Smyth v. Ames* is also referred to and reiterated in *Gunter, Attorney General, v. Atlantic &c., Railroad Co.*, 200 U. S., 273, 283. See also *McNeill v. Southern Railway*, 202 U. S., 443, 539; *Mississippi Railroad Commission v. Illinois, &c., Railroad Co.*, 203 U. S., 335, 340.

The various authorities we have referred to furnish ample justification for the assertion that inidviduals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.

SECOND.

Upon the second proposition we submit the following discussion with authorities:

The State Not an Indispensable Party.

We come now to a discussion of the question whether the State is an indispensable or necessary party to the proceedings; and the question whether the court can proceed to final judgment and do full justice to the parties, without the presence of the State.

First of all, let us see what under the statute the interest of the State is in the fund in question. Under the Act of February 17th, 1907, Section 5, the State reserves, or rather derives its interest in this fund, as the same is in the hands of the defendants, from the following provision: "Said Com-

mission shall pay to the State Treasurer, after deducting their compensation and other expenses, allowed by this Act, all surplus funds on hand, after paying all liabilities."

It is admitted that the entire liability of the State Dispensary was about Six Hundred Thousand Dollars, and that the funds in the hands of the Commissioners amount to about Eight Hundred Thousand Dollars. It also appears that the Fifty Thousand Dollars originally loaned by the State to the State Dispensary, with which to begin business, has been repaid and that the sum of One Hundred and Twenty Thousand Dollars, or thereabouts, which was in the State Treasury previous to the Act establishing this winding-up commission was paid to the commission by the State Treasurer.

The language in Section 5, *supra*, is "all surplus," funds on hand, after "paying all liabilities," and as these liabilities could be dcreased, the interest of the State would be increased, but to hold that the State was a necessary party because of this condition of affairs, would be to hold that the Legislature passed the Act in question with a view not to deal promptly and fairly with the creditors of the dispensary, but to save as much as possible out of the fund for the State, regardless of its just indebtedness, which cannot be true.

Again, can the court proceed to final judgment in this case without the State before it as a party? What has it to do? It has to ascertain through its own machinery or through the commission, what are just liabilities of the dispensary. Nothing more, nothing less, and the result or balance "all surplus funds" after such liabilities are paid, will belong to the State.

It is clearly a condition in which the State if it desires to see that this investigation is fairly made, so that it shall get most possible out of the fund, should come ino the case and be made a party. The State has parted with the entire fund by a declaration of trust executed by statute to the commissioners. Its interest is purely revisionary, the title being in the Commissioners in trust. This is shown by the fact before referred to that the treasurer actually paid to the commission the balance of One Hundred and Twenty

Thousand Dollars, in his hands at the time of the adoption of the Act.

Now, then, such being the facts and the reasonable deduction from them, and the state of the case, we refer to the case of *Cunningham against Maine and Brunswick Railroad*, 109 U. S., 446. The chief principle laid down is "that whenever it is clearly seen that a State is an indispensable party to enable the court according to the rules which governs its procedure, to grant the relief sought, it will refuse to take jurisdiction."

We observe that there is a total absence in this case of the elements so held to be essential in this decision.

There is no reason whatever why the court cannot call in all of its creditors, scale their claims, pay what is just, or require the Commission so to do, thus enforcing and not denying the terms of the Statute, and leave the balance in the hands of the Commission for the appropriation of the same under the terms of the statute.

The facts upon which the case of Cunningham is based are these:

The State had endorsed railroad bonds, taking a lien upon the property as security, and the company failed to pay interest upon the endorsed bonds, whereupon the governor of the State took possession and put the property in the hands of a receiver, who sold it to the State. The State thus became the actual owner of the property. The State took possession and took up the endorsed bonds, substituting the bonds of the State in their place. The holders of an issue of mortgage bonds issued by the Railroad Company, subsequently to those endorsed by the State but before the default in payment of the interest, filed a Bill in Equity to foreclose their own mortgage and set aside the sale, and to be let in as prior in lien, and for other relief affecting the property—setting forth the above facts; and made the governor and treasurer of the State parties.

These officers demurred, and it was held that the facts in the bill showed that the State "is so interested in the property that final relief cannot be granted without making it a party and the court is without jurisdiction."

Now in this case the facts are wholly different, because in the case cited the absolute title to the property was in the State and an effort was made to foreclose a prior lien. How could the title of the State be divested in a proceeding to which the State was not a party? else the railroad property would have to be sold subject to the title of the State.

In the present case the State has voluntarily declared a Trust by the Act of 1907, primarily in favor of the creditors, reserving to itself only such amount as should remain after the creditors have been fully satisfied. The title is by the Act of the State transferred to the Trustees, and the title can therefore be taken out of these Commissioners as Trustees in a proceeding to which they are parties whether the State be a party or not, and if this be so then the Court can administer the fund to the extent at least of preventing its waste and in preserving it for ultimate disposition according to the terms of the Statute. That is what this proceeding seeks to do.

The payment of the complainant's claims of course would follow, but the present purpose is to keep the fund intact until all claims can be gotten in and the rights of the State are in no way affected by such proceeding; and if the other view prevail that these claims have been adjusted and ought to be paid, then the State could not, if it were in the case, say anything against that position, because it was to effect that very result that the Statute was enacted.

Barney against Baltimore City, 6 *Wallace*, 280, is much relied on to maintain the position that the State is an indispensable party, but the facts in that case are widely different from those in the case at bar.

It was there held, as stated in the syllabus, that particular owners or tenants in common in real estate, of which partition is asked in equity, have an interest in the subject matter of the suit and in the relief sought, so intimately connected with that of their co-tenants, that if these cannot be subjected to the jurisdiction of the Court, the bill will be dismissed.

A single glance at the facts in the case show how wholly

inapplicable it is as an authority in the matter under discussion.

Tenants in common to real estate are entitled to possession and of course the Court could not grant a final decree in any disposition of the property or deal with it so as to affect the rights of tenants in common, who were not parties. The Court there cites the case of *Shield v. Barrow*, 17 *Howard*, 180, in which it is said.

> "A very able and satisfactory discussion of the whole subject is that they, that is to say, indispensable parties, are said to be persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity, and good conscience."

Taking this definition thus adopted in the Barney case and applying it to the facts in this case, let us see whether the State is an indispensable party to these proceedings.

Can a final decree be made without affecting the interest of the State? We say that it can, because the interest of the State is declared to be simply a surplus after just liabilities are ascertained, and the purpose of this proceeding is to ascertain the "just liabilities" and no more. The Court will not assume that there is any other purpose than to ascertain just what is due to creditors, justly and fairly. It will not do to say that the State is entitled to be present in the ascertainment of these amounts because we are not dealing with the question now as to whether the State is a proper party, or whether the State could not be a party if she sought to come in, but whether in her absence the interests of other parties can be ascertained. In other words, there is no claim on behalf of the State against this fund, which is to be adjudicated in these proceedings. The State has parted with the title and the title can be disposed of without the State. There is no account for the State filed with the Commission or in this Court, as in the case of the creditors. The State is not a creditor, but only entitled to the "surplus" after the creditors are paid. The State could seek no affirmative relief if

a party to the proceedings. It would simply stand by, while the investigation was being made. If it is said that the State has undertaken this investigation and that the powers of the former investigating committee have been by this Statute of Feb. 17, 1907, in express terms, conferred upon the "Winding-up Commission," we answer that that has nothing to do with the question, because by assuming jurisdiction the Court does not preclude the State from continuing to participate in such investigation of the claims, nor could it, if it so wished; but the point we make is that the Court has a right to proceed without the State in ascertaining what are the just liabilities, because the State has no claim to be asserted against the Commission, for any specific amount, and the State has no longer title to the fund.

Now, as to the second part of the definition: Can a final decree be made in this case, without the presence of the State, without leaving the controversy in such a condition that its final determination may be inconsistent with equity and good conscience? Certainly, there are no conflicting equities or rights between the creditors, nor liens to be adjusted, nor any right to be ascertained, except how much liquor various claimants sold the Dispensary, and how much money is due therefor, and this in the light of the fact that there is far more than enough to pay all, and that the State is entitled to the surplus. If these matters cannot be fully adjudicated in the proceedings as they now stand, it is inconceivable to suppose that they could be adjudicated before the Commission.

THIRD.

The Statute Created a Trust Fund.

In *McKee against Lamon*, 159 United States, 317, it was held that "where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which may be enforced by a bill in equity if not by an action of law, and that the acceptance of money with notice of its ultimate destination, is sufficient to create a duty on

the part of the bailee to devote it to the purpose intended by the bailor, and that in the enforcement of such a trust, a Court of Equity may make such incidental orders as may be necessary for the proper distribution of the fund."

In *Cleaves against Jamison*, 182 U. S., 401, funds were placed in the possession of the Governing Committee of the Stock Exchange in trust, that it would see that the purposes of the deposit were fulfilled and that the money was paid out only in accordance with the terms of the Trust under which it was deposited," and it was held that there was no question that the fund became thereby a *trust fund* in the possession of the Governing Committee and that it must be disposed of in accordance with the trust. "The Committee occupied, from the time of the deposit, a fiduciary relation towards the parties depositing it and became a Trustee of the fund, charged with the duty of seeing that it was thus applied."

The foregoing principles thus laid down in these authorities are general, but if it be said that they have no application to the fund owned by a State, the answer is found in the decision of the Supreme Court of the United States in *Baring* vs. *Dabney*, 19 *Wallace*, 1. In that case it appeared that in 1812 the Legislature of South Carolina by Statute created a bank by the name of "The Bank of the State of South Carolina;" the capital was to consist of various stocks bonds and securities specified, then belonging to the State, the same being in fact all the funds, bonds and securities which the State owned. The Bank thus belonged to the State. The President and Directors were to be elected by the Legislature, and made a corporation and body politic. The faith of the State was pledged to the support of the bank. In December, 1821, by another Statute the future profits of the Bank were pledged and set apart for the payment of a certain six per cent. stock, which the State had previously issued. This Statute, as well as subsequent legislation, gave rise to the controversy in the case, and the question arose whether the Statute could appropriate assets of the Bank so as to divert them from the debts of the Bank to the debts of the State, and it was held that although the

stock was altogether owned by the State, if the Bank be insolvent, its assets cannot be appropriated by legislative act or otherwise, to pay the debts of the State as distinguished from the debts of the Bank; *that the assets of the bank were a trust fund, first applicable to the payment of the debts of the bank.*

It was said that "An Act of the Legislature requiring the managers of an insolvent bank belonging to the State, to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts and, if assented to by them, amounts to a contract with them to carry out said trusts."

And to give effect to such legislation so substituting the debts of the bank for the debts of the State, would be to approve a law which was repugnant to the clause of the Constitution which prohibits a law impairing the obligation of contracts.

Now in this case the assets of the State Dispensary were originally owned by the State, but were pledged by the very act creating the dispensary from the very necessity of the case, to the payment of the debts of the dispensary. The creditors of the dispensary could never have sued the State for the recovery of the amounts due them, so long as the money remained in the Treasury of this State, but when the money was transferred by subsequent legislation to the commissioners, it went into their hands impressed, from the relation of the parties and the nature of the original contract, with a trust in favor of the creditors, which must be recognized in advance of the implied trust which still remained for the State, even if there had been no express trust for the State, as to any surplus after the creditors were paid, and the clear intention of the Statute is to give the creditors, first, a controlling lien upon this trust fund so in the hands of the Commissioners, otherwise the Statute is a vain excuse, giving the creditors no security whatever, and would evidence, what we do not think could be possible, a disposition on the part of the State to ignore and defeat their claims, in order that the State might reap a larger profit. Such,

we submit, cannot be the construction of the Statute; and even if it were the intention of the Legislature thus to defeat the claims of the creditors of the State by continuing to keep the money beyond their reach, such act would be unconstitutional. Good faith, as well as the legal obligation, required that that should be done which was intended to be done, to impress upon this fund a trust which should remain until the last dollar of just indebtedness had been paid, and that too, before the State could receive one dollar of the money.

The conclusion of the Circuit Judge, that the State was not an indispensable party, and could not claim the immunity provided in the Eleventh Amendment, because it had gone into the business of dealing in liquors preventing its citizens from engaging in the same business, is sustained by the reasoning of the decision in the *State of South Carolina against United States,* for the collection of internal revenue tax, where it was held that he state may control the liquor in South Carolina, but when it does so it engages in ordinary private business which is not by the mere fact that it is being conducted by a State, exempt it from the operation of the taxing power of the National Government.

The Internal Revenue tax on the sale of liquor is not a tax on property or profits of a business, but a charge on the business irrespective of the property used therein, or the profits realized therefrom. The exemption of the State Agencies from National taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business and in the case cited—Barings against Dabney, 19 Wallace 1, the State was actually the owner of the entire assets of a bank and had by legislation endeavored to use the assets for the payment of the debts of the State as against the debts of the Bank, and the Court denying this right proceed to administer the assets, the state not being a party to the cause.

In Chaffraix v. Board of Liquidation and others, 11 *Fed. Rep.,* 638, it was held:

> "The circuit court has jurisdiction to prevent by injunction the officers of a state from diverting a fund

collected by taxation and set apart under a statute of that state to pay certain bonded indebtedness of said state, to the end that said fund may be preserved intact until the rights of the parties and the interests of the state, if any she has, may be determined contradictorily. Such action is not forbidden by the eleventh amendment of the constitution of the United States, and is necessary for the proper enforcement of section 10 of article 1. of the same instrument. Pardee, C. J."

In *Swarsey v. N. C., in 71 North Carolina,* p— is an elaborate statement of the law. In that case the state had created a railroad and had authorized it to issue bonds and pledge the stock of the company to secure the payment of the bonds. The bondholders undertook to reach the stock. It was contended that the State of North Carolina having an interest in this stock was a necessary party and that therefore the suit could not be maintained under the eleventh amendment.

Said the Court:,"If a state could be brought into court it undoubtedly should be made a party before a decree is rendered, but since the case of Osborne against the Bank, 9 *Wheaton*, 739, it has been the uniform practice of the Courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents, without making the State a party, when the property or the agent, is within the jurisdiction; in such case the court acts through the instrumentality of the property or the agent."

This brings us within the line of the cases cited in support of the position that the officers of the State are really those who are the proper defendants in this case, who have the custody of the fund and the disposition of it under a statute, and that court can fully administer the fund without the presence of the State.

In the actions now before the Court the plaintiffs allege that there are specific amounts due them; in the Fleischman case; that such amounts have been passed upon by the Commission (see folio 29).

Now under the express terms of the Statute, these are

due from a trustee to a *cestui que trust*, and the presence of the State as a *cestui que trust* is not necessary to determine that issue. While these are not *aliquot* parts of a fund, they are fixed and determined, and the State is not entitled until they are paid.

> "When each *cestui que trust* is entitled to an *aliquot* share of an ascertained fund, he may sue alone for any accounting as to his interest, and the *cestui que trustent* entitled to the other *aliquot* shares are not necessary parties. (22 Encl. Pl. & Pr. 100, and cases cited.)
>
> "That the State cannot be made a party in a case where it is concerned, is a sufficient reason for the omission to do so, and the case may proceed to decree against her officers in all respects as if she were a party to the record."

Davis v. Gray, 16 Wall. 203, *Citing Osborn v. Bank*, *supra*.

The decision of the Supreme Court of South Carolina in *Water Power Company v. Electric Company*, 43 *S. C.*, 154, where it was held that the State was an indispensable party was based upon the fact that the State had reserved certain rights to water power when it conveyed the power to a Company, and the act of the State was drawn in question. In the case at bar, it is the failure of the State's agents to obey the State which forms the basis of the action. Referring to *In re Ayers*, 123 U. S. 500, the Court said that the distinction lay between that case and a case where the officers were wrong-doers, personally and individually, against whom the Complainants had a clear right of action, and that no other parties were necessary.

And in the other South Carolina case of *Lord v. Bates*, 48 S. C., 95, it was said that the State was not a necessary party to an application by a private citizen for mandamus to enforce a private right, and this was an application to Compel the State Treasurer by mandamus to fund certain bonds of the State under a Statute providing for such funding on certain conditions, the Construction of the Statute being the matter before the Court, and the result of the

case being to increase or not to increase the debt of the State, a matter in which it was vitally interested.

As further illustrative of the position that this is a trust fund in the hands of the commissioners, see *Maenhaut et al against City of New Orleans et al, 2nd Woods,* 108.

In that case money was collected to pay the interest on bonds, issued by the municipal corporation, under an act which provided that a tax to pay the interest should be levied, and enacted safeguards to secure the levy and collection, on the faith of which legislation the bonds were sold. This act was held a contract with the bondholders, the substantial performance of which they are entitled to exact, and it was further held that the money collected to pay the interest on said bonds levied, collected and set apart according to the provision of the act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders.

See also in this connection, *Case v. Beauregard,* 101 U. S., 688.

In the case of *"Board of Liquidation against McComb,* 92, U. S., 531; *will* be found an elaborate consideration of the entire doctrine."

In that case it was held that although the State could not be sued by an individual, and that a Court could not substitute its own discretion for that of Executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have Mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

The authorities cited in the Petitioner's brief in support of the proposition that the State is an indispenable party may be briefly noticed.

It is said in "Daniell's Chancery Pleading and Practice" Volume 1, Page 243;

"Moreover in some cases where the fund, the subject of the suit has been ascertained and appropriated, the Court has dispensed with the appearance of a personal representative to the testator, by whose will the fund has been bequeathed."

And in *Gregory against Stetson*, 133 U. S., 585, it appears "that the property upon which that part of the case was decided was that a Court cannot adjudicate directly upon a person's rights without having him *actually or constructively* before it, and it is stated that this principle is fundamental.

An examination of the legislation which vested this fund in the State Dispensary Commissions, shows that they represented the State to the extent of any surplus that may remain after the just liabilities of the State have been paid. In other words that it being their duty to see that the surplus was paid to the State after the debts contracted for the purchase of liquor had been extinguished, the State was and is, through them, constructively before the Court, as the record now stands.

The State could not be made a party as such, but the State can designate officers and agents to represent her so that she is represented in the proceeding by the officers of her own creation and appointment.

In *Arthur against Hughes*, 4 *Beavan*, one of the cases cited in Daniell's Chancery Pleading *supra.*, it was held that where an ascertained fund was remitted from abroad by an Executor to a person in England to distribute between legatees, that the Court could determine the right of the legatees without having a legal personal representative before the Court.

To avoid the rule thus clearly established in the older cases and affirmed at least in analogous cases of later date, the effort is made here to persuade the Court that there is no specific appropriation of fund for these creditors of the State, but that the amount is uncertain and cannot be made certain except in a proceeding to which the State is a party.

We maintain that under the Act of 1907 there is a clear specific appropriation of all funds derived from the sales of liquor to the payment of the debts contracted in its pur-

chase, and that while the commissioners were to ascertain and determine which of the claims against the State were just the State herself reserved no interest whatever in the fund until these liabilities had been paid.

In other words the creditors of the State were to be paid out of the fund so long as the fund lasted until such debts were paid, and if a surplus, the surplus then to go to the State.

The presence of the State, therefore, was only necessary to fix the amount to be paid the creditors and so long as the Commissioners are before the Court the State is represented by and through them and her interests can be thus fully protected.

In discussing this question the petitioner's counsel, at page 11 of their brief, quote from the opinion of the Circuit Court of Appeals, in which that Court argues that where the duties of the Trustees are clearly defined, the trustor is not even a necessary party to a suit brought to compel the trustees to discharge their duty, and reference is also made to what was said in the opinion of the Circuit Court of Appeals with reference to an assignment for the benefit of creditors and the similarity of the Act creating the Dispensary Commission to such deed of assignment.

So far as the latter suggestion is concerned, it is enough to say that the court referred to an assignment for creditors simply by way of illustration and comparison. It is true that the authorities cited by the petitioners seem to hold that in an action to enforce a trust under an assignment for creditors the assignor must be a party, if the deed provides that the surplus shall go to him, but the illustration adopted by the Circuit Court of Appeals is nevertheless appropriate to the case in hand, because of the peculiar conditions existing at the time of the passage of the Statutes under consideration.

The most casual reading of the Statutes will show that the primary object was to pay the debt incurred in the purchase of the liquor, and that the entire fund was assigned to the Commissioners for that purpose. Their primary duty was to ascertain the debts and pay them, and it is submitted that under the authorities cited, a right of action must necessarily

be implied in the creditors to recover the amounts due them, in an action against the Trustees of the fund, especially after these debts have been ascertained by them.

In support of their contention the petitioners claim that the debts sought to be collected in this proceeding are debts of the State, and that they, the Commissioners, represent the State. If this be the correct view, then it is submitted the State is constructively before the Court, and that is all that is required by the rule laid down by the authorities cited in petitioners' brief.

Besides *Gregory vs. Stetson*, already referred to, the petitioners refer to the case of *Minnesota against Northern Securities Co.*, 184 *U. S.*, 235, in which the rule is "that those are to be made parties who are either legally or beneficially interested, so that a complete decree may be made."

If, therefore, the object of the winding-up Statute in the case before the Court was to ascertain primarily what debts were due, and the Commissioners themselves were to determine this, as representing (necessarily by virtue of their office and powers) the State—as they claim—then the State as a beneficiary of the fund, if it is a beneficiary, is "constructively" before the Court as the matter now stands.

The test as applied in *Cunningham against Macon R. R. Co.*, 106 *U. S.*, 446, cited in petitioners' brief, is whether the presence of the party is indispensable in order to enable the Court, according to the rules which govern its proceeding, to grant the relief sought.

In *Christian v. Atlantic, etc., R. R. Co.*, 133 *U. S.*, 233, it is said that the State is an indispensable party to any proceeding in Equity in which its property is sought to be taken and subjected to the payment of its debts, and it appears in the case now before the Court, upon the very face of the record, that the plaintiffs are not attempting to take the property of the State; the State has itself appropriated these funds specifically to the payment of such liabilities as shall be found to be just, and has relinquished its title to the property in dispute absolutely and irrevocably, and is only exacting that the surplus shall be paid to it after it has been determined what are the just liabilities.

In *Williams v. Bankheard*, 19 *Wallace*, 571, and in *Barney v. Baltimore*, 6 *Wallace*, 280, the test is: will an absent party be directly affected by a decree made in his absence? And a complete answer to the objection now made to the absence of the State, and the assertion that the State is an indispensable party is, that the State cannot be affected by the payment of the just debts and liabilities of the State Dispensary, because under the terms of the Statute those liabilities are to be provided for and paid at all events.

In other words, even in the light thrown upon the question by these authorties, the interest of the State cannot suffer or be affected by a determination in the forum sought by the petitioners on the question of the justness of their debts, that being, as has been shown, the primary object of the Statute.

It was this view which was taken by the Circuit Court of Appeals, and none of the authorities cited by the petitioners show that there was error in so holding.

Again, the same doctrine, that it is sufficient if the party, whose absence constitutes the ground of complaint, is constructively before the Court, is clearly laid down in the cases cited by the petitioners in *Chadbourne v. Coe*, 45 *Fed.*, 822, and *Ribon v. Railroad Co.*, 16 *Walace*, 450. It is said there that the Court should not proceed unless the party is actually or constructively before it, and so on in effect, if not in express terms, it is decided in all of the authorities cited in the petitioners' brief.

In other words, the extent to which the Courts have gone is that, though they will not proceed to pass upon the rights of absent defendants, who have a substantial interest in the thing in controversy, they will do so, if such defendants are constructively before the Courts, so that their interests must necessarily be provided for in any decree which may be made as between the parties then and there before the Court.

The opinion of the Circuit Court of Appeals has presented this matter in another aspect, which is very suggestive, and which is practically conclusive of the question now under discussion. Briefly stated, it is this: There is no doubt but that the State can now come in and be made a party for the protection of whatever interests she may have in this fund,

if so minded. Can the State remain out of the case having by previous legislation gone into the liquor business, and having conducted it for years, and now fall back, as an excuse for her voluntary absence, upon the protection offered by the provision of the Eleventh Amendment to the Constitution? The conclusive answer is found in the case cited in the opinion below, *Bank of United States against Planters' Bank of Georgia*, 9th Wheaton, (22 United States) 904, in which it is said:

> "It is, we think, a sound principle that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen."

And we refer also to another case cited by the Circuit Court of Appeals in the same connection. *South Carolina vs. United States, 199 U. S., 437, in which it was said:*

> "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

Upon this third question raised by the Petition as to whether the Act of 1907 created a Trust, and divested the State of all control or disposition of the State Dispensary property, we submit that this has been covered in what has already been said, and it only remains to discuss the brief of petitioners on this question.

The petitioners maintain (page 18) that the act of 1907 under which the Commission was appointed, did not create a trust, and that it did not divest the State of all control or disposal of the State Dispensary Fund, so that the act next hereinafter referred to would be operative.

To support this position reliance is placed upon certain Constitutional provisions, now for the first time invoked in the cause, with reference to the ascertainment and payment of claims against the state (page 19).

Giving full effect to the South Carolina Case of *Bank vs. State*, 60 S. C., 465, there cited, which holds that under the Statute under consideration in that case claimants had only a right to have their claims established, and to sue upon them, and that such claims were not thereby finally validated, beyond further question, we submit that the statute in this case is very different. Here the Commission under the act of 1907, were not only to investigate the claims, and to pass on them, but also to pay them, without further action of the Legislature, out of a fund which was assigned to them by the Statute for that purpose, and this surely created a trust in favor of the creditors, as has been seen.

Here is the distinction between the case at bar and the class of claims contemplated by the Constitutional Provisions relied on; and also when the case also relied on, of *Campbell vs. Sanders*, 43 S. C., 577, was decided.

A mere power to investigate his claim would not, of course, create a trust in favor of the creditor, or a legislative contract with him. But the case must be wholly different, when the Legislature, recognizing that there is a contract, appropriates money, by handing it over to Commissioners charged not only with the duty to investigate the claims, but also clothed with the power to pay out the trust funds to the beneficiaries provided for as a class in the statute.

Reference is also made in petitioner's brief to *South Carolina vs. Gaillard*, 101 U. S., 433, and it is claimed that that case is in point. It will be at once observed, however, that the contention there was that the act permitting the taxpayer to tender Bills of the Bank of the State in payment of taxes, and have them sealed up and deposited to await the determination of the question whether they were to be received for taxes, constituted a new contract, while in the present case the act of 1907, creating the Winding-up Commission, defendants herein provided that the Commission should itself pay the just liabilities of the State incurred in

the liquor business out of the assets assigned to it by the Statute.

The creditors, therefore, had an interest in this assigned fund, if their claims constituted just liabilities of the State Dispensary, and no subsequent legislation could defeat that right, and the Circuit Court had taken jurisdiction, and had jurisdiction of a cause which was to determine whether such claims were then and there to be paid.

We are dealing now with the question whether the money in the hands of the defendants constituted a trust fund. As to the effect of the act of 1908, which was passed after this proceeding was commenced, and which attempted to lessen the power of the Commission, and change the status, we shall have a brief discussion of the end of this division of the argument.

The petitioner cites a number of cases (page 22), to the effect that if this act of 1907 created a Commission, before which the State authorizes its creditors to sue, and to have their claims established and adjusted, then it cannot amount to a contract irrevocable.

An examination of these cases throws very little light upon the question now before this Court, because the Statutes there considered provided simply for the investigation of claims, and not for the payment of them out of a fund specifically provided for that purpose.

We shall take up these cases, and briefly see what was involved in them, and the point decided.

Beers v. Arkansas, 20 *Harvard*, 517.

Here it was held that permission to bring the suit was not a contract, which could not be withdrawn by subsequent legislation. That is not the question here. In this case money has actually been appropriated for the payment of the debt.

Railroad v. Tennessee, 101 *U. S.*, 377.

Here it was held that a Statute which gave a right of action against a State could be repealed, but it does not appear that the right to sue was a part of the original contract, or that the Act giving the right to sue was coupled with a leg-

islative declaration that money should be held in trust to await the result.

Railroad v. Alabama, 101 *U. S.*, 832.

In this case the Statute gave the right of action against the State, and was afterwards repealed. *Held* that this deprived the Court of jurisdiction, but did not impair the obligation of the contract.

The difference between this case and the one under discussion is obvious, as stated above.

Hans v. Louisiana, 134 *U. S.*, 17.

This case decided two points—That a State cannot be sued by one of its own citizens in a Federal Court without its consent, and that when a State attempted to violate property rights, acquired under a contract with it, such attempt may be judicially resisted, and any law impairing the obligation of such a contract is void and powerless to affect such rights.

In re Ayers, 123 *U. S.*, 507.

Here also was a case involving the Statute of Virginia as to tendering coupons of State bonds for taxes, and the bringing of suits to recover the taxes from person so tendering them, and can have no reference to this case.

DeSaussure v. Gaillard, 127 *U. S.*, 216.

In this case it was held only that when the State gives the right of action against one of its officers, which is practically against the State it may provide for certain limitations and restrictions upon the exercise of the right, which is simply providing for a remedy against the State or its officers, and does not constitute a contract.

Smith v. Reeves, 178 *U. S.*, 436.

The point decided here was that when the State permitted one who complained of the assessment of his property for taxes, to pay the taxes, and bring an action against the Treasurer to recover the amount claimed to have been illegally assessed, the State could couple with the consent to be sued, a condition that the suit be brought in one of her own Courts.

Now it appears from the record that the legislature of South Carolina passed a Statute in 1908, which attempted to enlarge the powers of the Commission and give it more

of the nature and functions of a Court than had been conferred upon it by previous legislation. We submit that this Act of 1908 can affect the questions now before the Court:

The Amendment of 1908.

The decision of the State Supreme Court in upholding the act amending the "Winding-up Act," adopted by the General Assembly on February 24th, 1908, after these proceedings had been begun in the Circuit Court, and only a few days before the decision of the Circuit Judge was announced, fails to recognize and enforce the principle that such amendment is contrary to the Constitution of the United States.

This is essentially a question which this Court will consider whenever it is properly raised, and will disregard the decision of the State Court if it appear that the statute by that Court violates the provisions of the Federal Constitution.

It appears at page 294 of the record that the State Court gave full force and effect to this amendatory statute, and it also appears, at page 296 and 7, in the traverse filed by the plaintiffs to the return of the defendants, that the defendants set up in the first paragraph of their traverse that they are advised and verily believe said act (that is the first act creating the "Winding-up Commission) and the acceptance by the defendants, constituting the State Dispensary Commission, as trustees of the trust created by said act, and the acceptance by the complainants and the other creditors of said State Dispensary as *cestuis que trustent* of the benefits of the trust so created, constitute a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States.

And in the second paragraph the plaintiffs specifically assail the said amendatory act of 1908 as a violation of the provisions of Art. 1, Sect. 10, of the Constitution of the United States and Article 14, Section 1, of the amendments thereof, upon the ground that said act impairs, and attempts to impair, the obligation of the contract set out in the 1st paragraph, and deprives, and attempts to deprive, the complainants of their property without due process of law, and

denies, and attempts to deny, them the equal protection of the law.

It is to be observed that the first act creating the commission specifically directed them to pay the just liabilities of the State Dispensary; and the second act amendatory thereof, passed after the plaintiffs had filed accounts with the commission, and had had them adjudicated, and when the only thing left to be done was to pay them, gives the commission very large powers to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary; and it directs it to pay only such claims as have been submitted to and determined by it, and no others, out of the assets of the Dispensary.

It is true it does give the claimants the right to appeal to the Supreme Court as in cases at law and regulates the practice on such appeals.

This Court we submit had jurisdiction of these complainants and defendants before this statute was passed, and had it for the purpose of enforcing the provision of the former statute upon a state of facts crystallized before the proceeding was brought. The rights of these complainants, therefore, were fixed, fisrt under the Statute of 1907, *and secondly by the orders of this Court in this proceeding.*

An attempt, therefore, was made to deny and deprive the Circuit Court of its jurisdiction by passing the other act.

Now the new act would require these complainants, if it affects them at all, to go before the commission again and try their case, and appeal to the Supreme Court, and wait until in the usual course of business in that tribunal, the case might be heard and the decision handed down.

The new act, therefore, was a denial of the rights which the complainants had under the old contract, that is, to proceed to the office of the commissioners and receive their money upon claims which had been passed upon by them, and it impaired materially the rights given to the plaintiff under the act of 1907, which were the rights of the *cestuis que trustent*, to demand of the trustees a prompt and faithful performance of their duty.

In *Antoni v. Greenhow*, 107 U. S., 769, the same process

was adopted by the State of Virginia. Proceedings were pending in the courts to enforce the payment of coupons upon state bonds by tendering them for taxes. The legislature adopted an amendment of the statute under which this was permitted, which amendment provided another mode of procedure than that in force when the coupons were issued. The Supreme Court held that the new section furnished an adequate and efficacious remedy, substantially equivalent to that which existed at the date when the coupons were issued, and *therefore* the rights of the holder of them, in case the Collector refused to receive them for taxes, can be maintained and enforced and that the obligation of his contract with the state was not thereby impaired.

The difference between that case and the one now before the Court is obvious. The plaintiffs here are absolutely deprived of their money until they have complied with the regulations and gone through a process not included within the terms of the statute which created the trust of which they are the beneficiaries.

Pennoyer v. McConnaughy, 140 *U. S.*, 1.

An Act of the legislature of Oregon of Jany 17, 1879, repealed an act of that State of October 26th, 1870, both acts concerning the swamp and overflowed lands, and the second act made new regulations concerning the same. An application to purchase some of these lands had been filed after the first act before the enactment of the second. It was held, first, that such an application could not be perfected by making the payments required by the act of 1870 after its repeal, but within the time prescribed by that act, and the title thus acquired was good against the State; it was further held that the act of the legislature of 1887 declaring all certificates of sale of swamp or overflowed lands void, on which 20 per cent. of the purchase price was not paid prior to January 7th, 1879, and required the Board of Commissioners to cancel such certificates impaired the contract made by the State with the defendant in error, under the act of October 26th, 1870, as that act and the act of 1879 are construed by the Court, and therefore in

violation of Art. 1, Sect. 10, of the Constitution of the United States.

See also *Piqua Branch of State Bank, against Knoop*, 16 How. 369.

Osborne v. *United States Bank*, 9 Wheaton, 738.

Davis vs. Gray, 16 *Wallace*, 203.

FOURTH.

While the point is not raised in this application it was raised below under Section 720, Revised Statutes Injunction would not lie to restrain the Commissioners from paying out the fund in their hands upon the ground that under the Statute creating the Commission a Court was created.

While this question is not distinctly raised in the present application, we desire to submit a brief upon that question as it is, to some extent, at least incidentally involved in the present inquiry.

Defendants Not a Court.

There have been many commissions and boards and other similar bodies established by the State Legislation throughout the years and the question has often arisen in this and other courts as to whether these constitute courts, as the term is usually understood?

If we go back to Blackstone's Commentaries we find that in Volume 3, page 25, a court is defined in modern signification "to consist of at least three constituent parts, the *actus*, the *reus* and the *judax*—the actus, or plaintiff, complains of an injury done; the reus, or defendant, is called upon to make satisfaction for it, and the judax, or judiciary power, is to examine the truth of the fact and if any injury appears to have been done to ascertain and by its officers apply the remedy."

It would be difficult to find a definition which more clearly describes a court in all its parts and all its functions.

In *United States against Ferreira*, 13 Howard, 373, the question arose whether the District Judge of the United States for Florida who by Act of Congress was directed to adjudicate the claims for injuries suffered by the inhabitants of Florida by operation of the American Army in Florida—

which claims were to be paid if the Secretary of the Treasury should on report of the evidence deem it equitable, constituted a court, and it was held that the authority given him was not to exercise any of the judicial powers of the United States under the Constitution, but that the Judge acted as a "Commissioner," and no appeal lay from his decision to the Supreme Court.

The question is very elaborately discussed and the want of power as a court was held to exist because of the provisions of the Constitution of the United States. This authority naturally leads us to consider the Constitution of South Carolina in its bearing upon the question now before the Court.

The only Courts provided for under the Constitution of the State of South Carolina are, first, a Court for the trial of impeachments; second, a Supreme Court; third, a Court of Common Pleas and General Sessions; fourth, a Probate Court; fifth, Courts of Magistrates, and sixth, such other inferior courts as the General Assembly may from time to time in their wisdom establish.

A Commission cannot be held to be within the terms of this Constitutional provision, in that it is not in any respect "an inferior Court." It has no power to enter judgment or issue execution. There are no pleadings provided for it, no procedure adopted; provision is not made for appearance of parties before it in the way in which they are ordinarily to appear in Court, and a careful examination of the entire Statute fails to disclose that the Legislature contemplated the creation of any kind of a Court.

In Section 7 of the Statute (see folio 127) it is directed that the Commission shall submit to the Governor at the earliest date practicable a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary and as soon as the affairs are liquidated, a report in full of their actings and doings.

It would be inconceivable to suppose that the Legislature intended to create a Court which was to report to the Executive head of the State. The Executive and Judicial functions and departments are forever to be separate and

such provision would violate the spirit of our Institutions.

The Commissioners, as we have seen, are to give each a bond for ten thousand dollars. What a strange departure in our Legislature, to require a Judicial Officer to give bond. Each of the Commissioners is to have the power of all of them. This shows clearly the intention that they shall act simply in a ministerial and not in a judicial way.

Referring again to the Constitutional provision to which we have heretofore referred we find that in this last cited case, the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create courts inferior to the Supreme Court and by implication to define their jurisdiction, and it was held that this did not confer the power to create courts for the exercise of legislative or administrative functions.

In *Chicago, Milwaukee, etc. R. R. against Minnesota*, 104 U. S., 418, the question arose whether a warehouse and railroad commission constituted a court.

The usual powers given to such organization were conferred by an act creating it, and it was held that the act was in conflict with the Constitution of the United States as depriving a company objecting to the rates fixed by the Commission of its property without due process of law, and deprived of the equal protection of the law. It appears that the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the commission if it chose to establish rates which are equal and unreasonable, and in considering this question the Supreme Court of the United States, speaking by Mr. Justice Blatchford, says: (Pages 456-457.)

> "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in contro-

versy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be courts having the right under the Statutes creating them finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

We think this disposes of the view presented in the exceptions and raised in the pleadings that this "Winding-up Commission" constitutes a Court whose proceedings cannot be enjoined within the provisions of Section 720 of the Revised Statutes.

Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, engaged in the investigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the Dispensary were clearly intended simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact. What are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that institution.

They are to "sell property and to pay debts"—to pay all "liabilities" or "all just liabilities"—it matters not which. "of the State Dispensary."

In other words they are to take the assets as they find them and as agents or trustees, sell and realize upon them

and as such agents or trustees pay out the proceeds of their collections, returning to the State the surplus, if any.

In the *Southern Pacific against the Board of Railroad Commissioners,* 78 Fed., 236, the question arose as to whether certain Boards of Commissioners for railroad and other corporations created under the Constitution and laws of Califonia constituted a Court. They were named there also "A Commission." Now these Commissioners were given very large powers. *Inter alia,* they were to establish rates of charge for transportation of passengers and freight by railroad and other transportation companies, and they could enforce their decisions and correct abuses through the Court, and it was held (Judge McKenva) that this Commission was not a Court.

In *Ex Parte Childs,* 12 S. C., 111, it was held that a Commissioner appointed to take proof of bonds alleged to be invalid, and to ascertain and report what bonds and what proportion of bonds were valid obligations of the State, was not a Court, but only an officer charged with certain ministerial duties. Here it was called a Court —"The Court of Claims"—and had many of the attributes and functions of a court.

It was held "The 'Court of Claims' established by the Legislature by the act approved March 22nd, 1878 (16 Stat. 555) is not a court, organized under he authority of Article IV, Section 1, of the Constitution, but a tribunal in the nature of a board of audit, created under Article XIV, Section 4, to inquire into the amount and character of the unfunded debt of the State."

In *Busch v. Webb,* 122 Fed., 655, it was held that a Commissioner's Court of a County in Texas in declaring and publishing the result of the election, "acts ministerially and is not a court in the meaning of the Revised Statutes" (Sec. 720) "whose action in such capacity may not be restrained by the Federal Court."

This question is very fully considered and the authorities cited and it was held that something more was necessary than the mere conferring of ministerial powers, even when

the exercise of such powers was to lead to a definite result in reference to the election.

Western Union Telegraph Company vs. Myatt, 98, *Fed. Rep.*, 331. The question arose in this case as to whether the Court of Visitation of Kansas created by an Act of Legislature and given thereby and by the general laws of the State general powers to regulate the business of railroad and telegraph lines within the State, and among others the power to classify freight, to require the maintenance and construction of depots, regulate crossings and intersections of railroads and the operation of trains, with various other powers and duties, therein mentioned, is in the exercise of such power a legislative, administrative body, or whether it was a court. It was held that it was the former, though it was denominated "a Court," and provided with the machinery of one, and it was held that even the power to conduct an investigation in the form of legal proceedings, before taking action in the matters committed to it, did not constitute it a court.

Referring again to the Constitutional provision to which we have heretofore referred we find that in this last cited case the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create courts inferior to the Supreme Court and by implication to define their jurisdiction, and it was held that this did not confer the power to create courts for the exercise of legislative or administrative functions.

In Chicago, Milwaukee, etc., R. R. against Minnesota, 104 *U. S.*, 418, the question arose whether a warehouse and railroad commission constituted a court.

The usual powers given to such organization were conferred by an act creating it, and it was held that the act was in conflict with the Constitution of the United States as depriving a company objecting to the rates fixed by the Commission of its property without due process of law, and deprived it of the equal protection of the law. It appears that the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the commission if it chose to establish rates which are equal and unreasonable, and in considering this question the Supreme Court of the

United States, speaking by Mr. Justice Blatchford, says: (Page 456-457.)

> "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be courts having the right under the Statutes creating them, finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

We think this disposes of the view presented in the exceptions and raised in the pleadings that this "Winding-up Commission" constitutes a Court whose proceedings cannot be enjoined within the provisions of Section 720 of the Revised Statutes.

Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, engaged in the ivestigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the dispensary were clearly intended

simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact. What are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that Institution.

It is thus submitted upon the whole case that the views expressed by the Circuit Court of Appeals are sound upon principle and fully supported by decided cases, and should this Court direct the record to be certified for examination and correction of the Decree, there shall be found no error requiring its interposition.

We have discussed at length all the questions arising upon the merits of this controversy, and the record is before the Court.

We therefore submit to the Court that under the authority of *American Sugar Refinery Company* against *New Orleans*, 181 U. S., 283, the Court will now, in this proceeding, pass upon the merits, and hold that the Circuit Court of Appeals committed no error, and remand the case to that Court with direction to proceed with it according to its judgment heretofore entered.

T. MOULTRIE MORDECAI,
FRANK CARTER,
SIMEON HYDE,
H. C. CHESTER,
Attorneys for Respondents,
Wilson Distillery Co.
Wilson Distilling Co.

In the Supreme Court of the United States

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, ET AL., PETITIONERS,

versus

WILSON DISTILLING COMPANY, ET AL and THE FLEISCHMANN COMPANY,
RESPONDENTS.

BRIEF IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI, BY GEORGE B. LESTER AND ALFRED S. BARNARD, Counsel for Respondents, The Fleischmann Company.

This is a petition for a writ of certorari to review a decision of the Circuit Court of Appeals for the Fourth Circuit affirming an interlocutory order of the Circuit Court for the District of South Carolina, granting an injunction and appointing receivers.

The application for the writ presents two inquiries, the first involving the jurisdiction of this Court, that is the power of the

Court to issue a writ of certiorari in a case of this character, and the second the discretion of the Court, that is ought the writ to be issued, even if this Court should be of the opinion that it has the power so to do.

(1) *Has the Court the power to issue a writ of certorari in a case of this character?*

For the purpose of determining this question we deem it advisable to refer briefly to the decision of the Circuit Court of Appeals and ascertain what that Court did decide and the nature and effect of its decision. A reference to the record and the opinion rendered by the Circuit Court of Appeals, will show that the only question presented to and considered by that Court, was, whether or not the Circuit Court for the District of South Carolina erred in granting an injunction and appointing receivers, and the judgment of the Circuit Court of Appeals was that the case "be remanded to be further proceeded with in accordance with the views herein expressed." The decision of the Circuit Court of Appeals was not a final one, nor does it contain any element of finality, and it is well settled that no appeal would lie therefrom to this Court, because the act of Congress which provides for appeals from interlocutory orders granting injunctions and appointing receivers, limits the right of appeal to the Circuit Court of Appeals.

Kirwan vs. Murphy, 170 U. S., 205.

Nor can this Court by a writ of certiorari require a case to be removed to it from the Circuit Court of Appeals, unless the judgment of the Circuit Court of Appeals was a final one or the record before the Circuit Court of Appeals presented the case in such wise that the Court of Appeals might have finally decided it.

Chicago & Northwestern Railway Co. vs. Osborne 146 U. S., 354.

Taylor vs. Louisville & Nashville R. R. 172 U. S., 684.

Harriman vs. Northern Securities Co. 197 U. S., 244.

And especially is this true where the nature of the case is such that an appeal will lie direct to this Court from a final decree of the Circuit Court.

Re Tampa Surburban R. R. Co. 168 U. S., 583.

The fact that the Circuit Court of Appeals may have committed error in affirming the interlocutory order of the Circuit Court is no reason for granting a writ of certiorari where the petitioner has another remedy or may bring the case to this Court from a final decree of the Circuit Court.

In Fields vs. United States 205 U. S., 292, Mr. Justice Brewer says: "A certiorari can be issued only when a writ of error cannot," and certainly this language would apply with equal force to an appeal. In other words, a writ of certiorari cannot be issued when an appeal will lie.

The petitioners have attacked the jurisdiction of the Circuit Court upon the ground that the suit is one against the State of South Carolina and within the inhibition of the Eleventh Amendment to the Constitution of the United States. The case, therefore, involves an application of this amendment and is within that class of cases which may be, by the judiciary act of March 3d, 1901, brought directly to this Court by an appeal.

Loeb vs. Columbia Township 179 U. S., 472.
American Sugar Refining Co. vs. New Orleans 181 U. S, 277.

It may be contended that the principle requiring a final decree in the Circuit Court of Appeals before a certiorari will issue from the Supreme Court, has been modified by the case of Forsythe vs. Hammond 166 U. S., 514, but a careful reading of the opinion in that case, taken in connection with the decision in the Harriman case *supra*, will show that the real reason for granting the writs in those cases was the fact that the Court of Appeals had the entire controversy before it in such way that it could have and ought to have rendered a final judgment. In fact, the decision was in effect final, although the cases were

remanded to the Circuit Court for further proceedings, the only proceeding being to render a judgment in accordance with the decision of the Circuit Court of Appeals. In the Harriman case Chief Justice Fuller uses this language: "In applying to this Court for the writ of certirorai, counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the merits, although the decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ in the circumstances notwithstanding the decree was not final. In our opinion the record presented the whole case to that Court in such wise that it might properly have been finally disposed of in terms by its decree in accordance with the well settled rule upon that subject."

The clear inference from this language is that unless the Circuit Court of Appeals has rendered a final judgment or the record before the Circuit Court of Appeals presented the case in such a way that it might have been finally decided, or the judgment rendered by the Court of Appeals, practically disposed of the whole controversy, a writ of certorari cannot and will not be allowed.

(2) *Should this Court grant the writ?*

The principal and practically the sole ground upon which the petitioners insist upon the exercise of this discretionary power of this Court, is the conflict of decision between the U. S. Circuit Court affirmed by the Circuit Court of Appeals and the Supreme Court of South Carolina, but an examination of the record will show that this conflict, if any exists, was brought about by the petitioners themselves, or at least in a suit to which they were friendly, although they appeared in the record as adverse parties. No one can read the record in the case decided by the Supreme Court of South Carolina without at once reaching the conclusion that the suit instituted there was collusive, its chief purpose being to get a decision of that Court, which the petitioners thought would be binding upon the U. S. Circuit Court for the District of South Carolina. Again it will be seen that the case before the Supreme Court

of South Carolina involved only $15,000 of approximately $800,000 then in the hands of the petitioners, and that $15,000 having been paid there is no longer any danger or probability of a conflict between the two Courts, should the order of the Circuit Court directing the money to be turned over to the receivers appointed by it, be put into effect. The conflict between the decisions of the Court of Appeals and the Supreme Court of South Carolina is in no sense "fraught with disastrous results to the commissioners and the banks," nor will that conflict result in any inconvenience or embarrassment in the future conduct of the cause in the Circuit Court. There is therefore, no reason for the interposition of this Court to review the decision of the Circuit Court of Appeals on appeal from the interlocutory order, for it is well settled that this Court will not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Suppose the petitioners should, as required by the order of the Circuit Court, pay the fund in their hands to the receivers, it would only be for the purpose of preserving the fund until a final determination of the controversy. If on an appeal from the final decree of the Circuit Court this Court should be of opinion that the Circuit Court had no jurisdiction it would at once direct that the fund in the hands of the receivers be paid back to the commissioners (petitioners) and this would, of course, relieve them from any possible liability to the State of South Carolina. Even in those cases where this Court has held that it had the power to issue a writ of certiorari, it has reiterated the doctrine "that it is a power which will be sparingly exercised and that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instructions, and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final to be certified, can be properly invoked."

And this Court has uniformly declined to issue writs of certiorari in cases where, there being only a matter of private in-

terest, no final judgment had been rendered in the Court of Appeals.

Chicago & Northwestern R. R. Co. vs. Osborne 146 U. S., 354.

The question involved in this litigation may be of great interest to the parties, but it is of private concern only and not one of public importance, nor is there any reason why this Court should take control of the litigation in order to avoid a conflict of jurisdiction, especially when the jurisdiction of the Circuit Court first attached, and the case was brought in the State Court plainly for the purpose of provoking such a conflict.

Respondents respectfully insist, therefore, that no final decree having been rendered in the Circuit Court of Appeals and the record not having presented the case in such a way that it might have been finally disposed of on the merits, and the case being one in which the petitioners have a right of appeal from the final decree of the Circuit Court, this Court has no power to issue the writ asked for.

And further, that the question involved being one of private interest only and not one of gravity or public importance, and there being no conflict of decision which is likely to bring about any inconvenience or embarrassment in the future conduct of the cause, there is no necessity for this Court to intervene in the litigation at this stage, and the writ ought not to issue, even though the Court should be of the opinion that the power to issue it does exist.

ON THE MERITS.

The petitioners filed in the Circuit Court of Appeals six assignments of error, which assignments really presented but three questions, and in their brief on this motion they have confined their discussion to three points. In order to deal with the questions intelligently we think a clear understanding of the nature of the case is essential, and to this end we present the following:

Statement of Facts.

It appears from the record in the Circuit Court of Appeals, that, in 1892, the State of South Carolina established an institution which became known as the State Dispensary; that by the provisions of the act creating such institution, all persons within the State of South Carolina were forbidden and prohibited from manufacturing, selling or distributing, or from keeping or offering for sale within the State any spirituous, malt, vinous, fermented or other intoxicating liquors; that the business was carried on under the direction of a board known as the Board of Directors of the State Dispensary, whose duty it was to purchase all alcoholic liquors for lawful use within the State, and to sell the same to the various county dispensaries, as provided in said act. The law further provided that all money arising from the sale of liquors by the Board of Directors of the State Dispensary should be deposited with the State Treasurer, and should be held by him as a special fund, separate and distinct from the general funds of the State and kept to the credit of the Board of Directors of the State Dispensary; that all liquors purchased by said Board of Directors of the State Dispensary should be paid for out of these funds by a warrant to be issued by the State Dispensary Commissioner, at the direction of the said Board of Directors of the said State Dispensary, and no part of this special fund could be lawfully paid out by the State Treasurer except upon warrants so issued. That this fund was to be applied, first to the payment of the expenses incurred in the conduct of the business, the net profits realized being the only part of the funds subject to appropriation; that while this law was in force and the State Dispensary was still engaged in business, the complainants (appellees) sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable whiskies and other spirituous liquors, all of which whiskies and liquors were received and accepted by the said Board of Directors of the State Dispensary, and the greater part of them had been at the time of the passage of the act of 1907, hereinafter referred to, sold at a substantial profit, a part of the money arising from such sale being at that time in the

hands of the State Treasurer to the credit of the said Board of Directors of the State Dispensary. That the General Assembly of the State of South Carolina at its session held in the year 1907, passed an act abolishing the State Dispensary, and at the same session passed another act, which was approved on the same day, to-wit, the 16th day of February, 1907, providing for the disposition of all property connected with the State Dispensary and for winding up its affairs. By the terms of this last act, the Governor of the State was authorized and directed to appoint a commission consisting of five business men, whose duty it should be to close out the entire business and property of the State Dispensary by disposing of all goods and property connected therewith, by collecting all debts due to it, *and by paying from the proceeds thereof all just liabilities at the earliest date practicable.* Said act also provided that said Commission should be at liberty to make such disposition upon such terms, times and conditions as their judgment might dictate, and also allowed said Commission to return to the persons, firms or corporations from whom purchased, all liquors which had been illegally bought by the managing agents of the State Dispensary, and for the purpose of determining what liquors, if any, had been illegally bought, the commission was authorized to make investigations as provided in said act. That, within a short time after the passage and approval of the act of 1907,, the defendants (appellants) were appointed commissioners, and said defendants having duly qualified and organized, pursuant to said act, became, and at the time of the institution of this suit were, and do now constitute the State Dispensary Commission. That immediately upon their qualification as commissioners and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and, in accordance with the act providing for their appointment, took possession and control of the entire business and property of the State Dispensary; that at the time said defendants took control, there was in the hands of the State treasurer, to the credit of the State Dispensary, a large sum of money, amounting to about $150,000, and this money was thereupon turned over to the defendants and placed to their credit in bank, along with the money realized from the

sale of the property of the State Dispensary and the collection of debts due to it. That at the time the defendants took possession of the property, there was on hand at the warehouse in Columbia, a large quantity of whiskies and other spirituous liquors which had been bought from various individuals, firms and corporations. That there was on hand a large quantity of whiskies and other spirituous liquors which had been purchased from the Fleischmann Company; that the Commissioners thereupon requested the Fleischmann Company to take back such goods as had been purchased from it and had not been disposed of by the State Dispensary, and held out to the Fleischmann Company as an inducement for so doing that it would enable the Commission to more rapidly dispose of the goods on hand, and would greatly facilitate a settlement of the affairs of the State Dispensary and enable the Commission to make a much earlier payment of its liabilities. That the Fleischmann Company did take back all of its goods on hand and gave credit therefor at the invoice prices thereof. That thereafter the Fleischmann Company furnished to the Commission at its request an intemized statement of the account held by it against the State Dispensary and the said Commission notified said Company that there was a discrepancy between the amount claimed by it and the amount shown to be due by the books of the Dispensary of $292.14, and claimed that the State Dispensary was entitled to a credit of that amount, at the same time stating that the account furnished by the Fleischmann Company had been audited and that it corresponded substantially with the account kept by the State Dispensary, and that there was a balance due in accordance with said audit and the books of said State Dispensary of $66,501.19; that said credit was duly allowed and the Fleischmann Company then insisted that the balance due to it should be paid, but notwithstanding the defendants had realized from the sale of the property of the State Dispensary and from the collection of debts due to it and had to their credit in bank, together with the sum which had been received by the State Treasurer, about $800,000, a sufficient sum to pay all of the liabilities, the Commission declined and refused to make any payment. Thereafter, on the 23d day of January, 1908, the

Fleischmann Company filed its bill (record, page 17), on which a notice to show cause was issued returnable before the Circuit Judge at Asheville on the 29th day of January (record, page 29), and on the next day, upon an affidavit to the effect that the Commission had threatened to turn over the money in their hands to the State Treasurer, a restraining order was issued enjoining the defendants, as hereinbefore stated (record, p. 23). On the return day of this notice, a return was filed, in which it was admitted that the books of the State Dispensary had been audited, and the entries thereon had been brought into substantial agreement with the items of the Fleischmann Company's account.

On the hearing the case was fully argued, and on the 29th day of February, the Circuit Court handed down its decision and entered an order directing that an injunction *pendente lite* should issue, in accordance with the prayer of the bill (record, page 86), the opinion of the Court upon the questions involved being filed on the 5th day of March, 1908 (record, p. 88).

On the 19th day of February, 1908, the Wilson Distilling Company and others, who had theretofore brought suit against the Dispensary Commission filed an amended and supplemental bill (record, p. 105), on which a notice to show cause was issued, returnable on the 29th day of February, 1908 (record, page 122), and, on motion, the hearing on this order was postponed until the 7th day of March, 1908 (record, p. 143). It having been made to appear to the Court, on the 6th day of March, that there was danger of the fund in the hands of the Commission being diverted, an order was entered appointing temporary receivers (p. 189), and at the hearing on the next day, the two causes of Wilson Distilling Company and The Fleischmann Company were consolidated, and upon the evidence in both causes the Court ordered that an injunction *pendente lite* should issue and appointed permanent receivers to take charge of and administer the fund in the hands of the Commission. From this order an appeal was taken to the Circuit Court of Appeals.

It appears further from the record that after the Circuit Court had announced its decision, taking jurisdiction of the

case, and issuing an injunction *pendente lite*, a proceeding was instituted on behalf of the attorney general of the State of South Carolina in the Supreme Court of that State to compel the Commissioners to pay to the petitioner a part of the money in their hands (record, p. 232). Upon this petition and the return thereto an opinion was handed down by the Supreme Court of South Carolina, construing the act of February 16th, 1907, and, thereupon, a motion was made before the Circuit Judge to vacate his orders continuing the injunction and appointing the receivers. This motion was heard on the 27th day of March and denied. But the Circuit Court, treating the motion as an application to have the amount paid, made an order directing its payment and payment was made (record, pp. 298 to 301).

ARGUMENT.

All three contentions of the petitioners are so closely related that they may be discussed together, for if the suits are suits against the State of South Carolina or the State is on indispensable party the some result will follow. In either event the Circuit Court of the United States was without jurisdiction and any consideration of these questions involves the third and makes it necessary to determine the exact position of the petitioners and the status of the fund in their hands, under the provisions of the Act of 1907.

It will be observed that by that act it became the duty of the State Dispensary Commission to close out the entire business and property of the State Dispensary, excepting real estate, by disposing of all goods and property connected therewith, by collecting all debts due, and *by paying from the proceeds all just liabilities at the earliest date practicable*. And it was left to the Commission to decide when, upon what terms and conditions the property should be disposed of, and the only matter concerning which they were authorized to make investigations was with reference to liquors then on hand, the sole purpose of such investigation being to ascertain whether or not those liquors had been illegally bought, and if so illegally bought, return the same to the persons, firms or corporations from whom

they had been purchased. When, therefore, the Commission induced the creditors, and particularly the Fleischmann Company, to take back all of the goods remaining on hand which had been purchased from that company, it had no further power under the act except to audit that company's claim and pay the same if it was found to be correct. As to the payment for those goods which had been purchased by the State Dispensary and disposed of, the Commission had no discretion. The State Dispensary had accepted the property, it had been sold at a substantial profit and the act recognized the amount due as a just liability. The only question which could have been possibly contemplated as open for investigation, was the validity of the purchase of the goods remaining on hand at the time the Commission took charge. The Commission returned the goods which they desired to return, converted the remainder into cash, collected the debts, and the fund derived from such sales and collections clearly became a trust fund for the benefit of those creditors who held just liabilities against the State Dispensary. The members of the Commission were merely trustees, whose duty it was under the act to apply the money in their hands to the payment of these debts. A dispute having arisen then between any creditor and the members of the Commission as to the amount justly due, there was but one way by which a settlement could be reached, and that was to adjudicate the question in some Court.

If we eliminate, then, all the foreign matter which has been dumped into the case, get rid of the political features of it and shut out the hue and cry about States' Rights, it will be seen that it is a plain, everyday suit in equity brought by a *cestui que* trust to compel a trustee, holding property for his benefit, to perform the duties imposed upon him by the instrument creating the trust. A suit brought merely for the purpose of settling a dispute between a *cestui que* trust and a trustee as to the amount legally due to the *cestui que* trust out of a fund in the hands of the trustee. The only novel feature in this case, and that is more apparent than real, is that the trust was created by a State. But this is not new, for it has been fre-

quently held that a State, or sovereign, can create a trust and that a trust so created is enforceable in a Court of Equity.

Perry on Trusts, Sec. 30.
Bd. of Liq. v. McComb, 92 U. S., 541.
Chaffraix vs. Bd. of Liq., 11 Fed., 638.
Swasey vs. N. C. R. R. Co., 23 Fed., Cases 518 (case No. 13,679).

The same principle is clearly recognized in *Louisiana vs. Jumel*, 107 *U. S.*, * * * and also in *Vose vs. Int. Imp. Fund*, 28 *Fed. Cases*, 1286, and *Ford vs. Delta & Pine Land Co.*, 164 *U. S.*, 662.

As was said by this Court in *McKee vs. Lamon*, 159 *U. S.*, 317,

"There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which may be enforced by a bill in equity, if not by an action at law. The acceptance of money, with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor."

See also:

Bearings vs. Dabney, 19 Wall, 1;
Clews vs. Jamieson, 182 U. S., 461 (479-480).

It is clear from the provisions of the act of 1907 that the money in the hands of the Commission is a trust fund out of which the creditors holding just liabilities against the State Dispensary are entitled to have their debts paid, and a suit brought by a creditor, or by several creditors for the purpose of determining the amount of the liability and of compelling the Commission to pay the same is not a suit against the State, nor is it one in which the State has an inseparable interest. The title to the property is in the Commission and they have the possession. The State's interest, if it has any, is represented by the Commission and a Court of Equity can render a decree which will fully determine the rights of all the parties

For the purpose of doing this, it is not necessary that the State should be before the Court, and inasmuch as the State cannot be made a party without depriving the Court of its jurisdiction, it is well settled that the State need not be brought in.

It cannot with reason be contended that the Commissioners are even officers of the State in the sense in which that term has been used in connection with suits brought against State officers. No discretion is vested in them as to the payment of a just liability, whenever a liability has been determined to be just, and if a dispute arises as to the justness of any claim, this dispute can only be settled in a regularly constituted Court of justice. This is not, then, in any aspect of it, a suit against the officers of the State to compel the officer to perform something which the State has said that he should not do, but rather to require him to do that which the State has directed him to do. As stated above, it is a suit brought to enforce a trust, a dispute having arisen between the trustees and certain of the *cestuis que* trust as to the amounts justly due. The mere fact that the State created the trust does not make the State an indispensable party.

McKee vs. Lamon, *supra*.

But, if it should be admitted that the members of the Dispensary Commission are officers of the State of South Carolina, they certainly are officers appointed solely for the purpose of carrying out the provisions of the act of 1907, and they hold the money which has come into their hands applicable to the purposes designated in that act. It may be regarded as well settled that where officers are appointed solely for the purpose of carrying out specific duties, they are not general officers of the State in such sense that a suit against them is a suit against the State within the inhibition of the 11th Amendment.

W. U. Tel. Co. vs. Myatt, 98 Fed., 335.

It is clear from the foregoing authorities that this is not a suit against the State, and the question arises, is the State an indispensable party?

A careful reading of the act will show that the State has reserved neither title nor interest to the fund in the hands of the Commission. Section 5 of the act merely directs that the Commission shall pay to the State treasury any surplus which may remain in their hands after the payment of all expenses incident to the administration of the trust, *and after discharging all liabilities.*

It will be noted that the State is not claiming any interest in this fund, nor does it by the act of 1907 claim any interest in the fund until all of the just liabilities of the State Dispensary have been paid and the expenses incident to the carrying out of the act deducted. The only suggestion of the interest of the State comes from the appellants themselves, who in their return contend that they hold the money as the property of the State, but it is well settled that if the State is not necessarily a defendant, the Courts of the United States are bound to exercise jurisdiction, even though some interest of the State may be affected by the decision.

U. S. vs. Peters, 5 Cranch. 136;
Louisville, &c., R. R. Co., vs. Leston, 2 How., 551.

And, certainly it can never be alleged that a mere suggestion of title in the State to property in possession of an individual must arrest the proceedings of the Courts and prevent their looking into the suggestion and examining the validity of the title.

Tindell vs. Wesley, 167 U. S., 220.

The case at bar is clearly distinguishable from Cunningham vs. Macon, &c., R. Co., 109 U. S., 455, and Christian vs. Atlantic &c., R. R., 133 U. S., 233 because each of these cases there was an effort to reach by foreclosure, property, the title to and possession of which were both in the State, and of course, before the Court could transfer the title it was necessary to have the legal owner and holder before the Court; but here the State has neither the title to, nor the possession of, the fund out of which the complainants are seeking to have their debts paid, and in order to enforce the provisions of the act of 1907

and to carry out the trust therein established the State is not a necessary or indispensable party.

McKee vs. Lamon, 159 U. S., 322;
Bd. of Liq. vs. McComb, 92 U. S., 531.

The test of indispensable parties is, as was said in Horne vs. Lockhart, 17 Wall., 579, whether their interests are so interwoven and bound up that no decree could be made without necessarily affecting them, and it is only the presence of parties thus situated which is essential to the jurisdiction of the Court. The question always is, or should be, whether to a decree authorized by the case presented, the party who is not before the court is an indispensable party, for, if the interests are severable and a decree without prejudice to that party's rights can be made, the jurisdiction of the court should be retained.

It is plain from the provisions of the act itself that the State of South Carolina intended that the question as to whether or not a claim presented to the Commission was a just liability of the State Dispensary, should be settled by the Commission, and that if it was necessary to litigate the question, the litigation should be between the claimant and the Commission. The State has provided that the just liabilities of the State Dispensary should be paid, and certainly it cannot be presumed that the Court will not fully protect the interests of the State in deciding what is a just liability. If the liability is just it should be paid and the interest of the State is not affected by a decree directing such payment. In other words, this is clearly a case where a Court of equity can render a decree upon the case presented and can adequately and fully determine all the issues between the parties without doing violence to any right of the State and without prejudice to any interest which the State may have. This being so, the State is not an indispensable party to this litigation.

Horne vs. Lockhart, *supra.*

The petitioners devote much of their brief to the argument that the State of South Carolina had the right to establish the

State Dispensary; that the dispensary was a State institution and therefore the debts contracted in its management created the relation of debtor and creditor between the persons selling to the State Dispensary and the State of South Carolina. They then argue that the relation of debtor and creditor having been created, it was not changed by the act of 1907, and they reason from this that the effect of that act was not to create a trust fund for the benefit of complainants and others holding just liabilities against the State Dispensary, and that a suit brought by the creditors is necessarily a suit against the State, the debtor. We think even though it be conceded that the State of South Carolina did have the right to go into the liquor business; that the relation of creditor and debtor did exist between the State of South Carolina and the various persons who sold goods to the State Dispensary, it does not at all follow that when the debtor, the State of South Carolina, by the act of 1907, transferred all of the dispensary property to the petitioners, with directions that it be disposed of and applied to the payment of the just liabilities, that act did not create a trust in favor of those creditors holding just liabilities, which trust the creditors might enforce. And when the creditors accepted the trust and elected to collect their debts out of the fund in the hands of the Commission, the result was a contract between the State and the creditors, which could not constitutionally be impaired.

See Ford vs. Delta & Pine Land Co., 164 U. S., 662.

The petitioners further contend that this Court is bound by or at least ought to follow the decision of the Supreme Court of South Carolina in its construction of the act of 1907. It should be borne in mind that at the time the bills were filed, there had been no decision of the Supreme Court of South Carolina construing or attempting to construe the act of 1907. That it was only after the jurisdiction of the Circuit Court of the United States had attached and that Court had been called upon to adjudicate the rights of the parties under that act, that the decision of the Supreme Court of South Carolina was rendered. We take it that it is no longer an open question in the

Courts of the United States, that those Courts not only do, but are bound to exercise their independent judgment in cases brought for the purpose of establishing rights under the statutes or constitution of a State, where the State Court has not at the time construed the statute or the constitution. This was so decided in

Pease vs. Peck, 18 How., 595;
Burgess vs. Seligman, 107 U. S., 20 (33);
Carroll vs. Smith, 101 U. S., 556,

all of which are cited with approval in a very exhaustive opinion on this question delivered by Mr. Justice Harlan in Great So. Hotel Co. vs. Jones, 193 U. S., 533.

We think that the foregoing authorities establish beyond question that the fund in the hands of the Dispensary Commission out of which the complainants are seeking to have their debts paid is a trust fund, that this suit is not a suit against the State, but is a suit between the complainants and the members of the Dispensary Commission as trustees for the purpose of having the trust established by the said act declared and administered. That the State is not a necessary or indispensable party to the litigation and that if the members of the Commission are regarded as officers of the State, the purpose of this suit is not to require them to do what a statute of the State forbids their doing, but to compel them to do that which the statute says they shall do, as was the case in Rolston vs. Crittenden, 120 U. S. That they are vested with no discretion in the matter because as soon as a liability is established to be just it is their plain official duty to pay the same. That this is not, therefore, a suit against the State, and is clearly distinguishable from the case of Louisiana vs. Jumel, 107 U. S., 711. The principle upon which this suit is based being fully sustained by

Osborne vs. Bank, 9 Wheat., 738;
Bd. of Liq. vs. McComb, 92 U. S., 531;
Pennoyer vs. McConnaughy, 140 U. S., 1;
Tindell vs. Wesley, 167 U. S., 220.

There has been much discusison in this case of the very interesting question as to how far the Eleventh Amendment protects a state against a suit to enforce the payment of a debt contracted outside of its sovereignty. A decision of this question is not essential because the suits of complainants are fully sustained by the ordinary principles of equity applicable to the administration of trusts. But if we must construe the Constitution in the light in which it presented itself to the framers, it may well be doubted if the Eleventh Amendment affords any protection against such a debt. The purpose of the Amendment was to protect the state in the exercise of those functions which pertain to its sovereignty and while a state may have the power to engage in business in competition with its citizens, it is inconceivable that the framers of the Eleventh Amendment ever contemplated that a state might engage in business, contract debts in the purchase of property used to carry on the business, sell the property, so purchased, at a large profit, put the money, realized from the sales, into its treasury and when called upon to pay plead the Eleventh Amendment and say to the creditors whose property it has taken, you can not enforce your just claims by suit and therefore you must accept such part of your debt as the State is inclined to pay or get nothing. This would indeed change the Amendment from a shield to a sword. That it was not so intended and that the State is amenable to the law whenever it engages in business outside of its sovereignty, is clearly established by this court in a decision to which this very state was a party and this very business and institution was involved.

South Carolina vs. United States, 199 U. S., 437.

The respondents respectfully submit that the Circuit Judge committed no error in taking jurisdiction of these suits and in continuing the injunctions to the hearing and appointing receivers to preserve the fund; that the decision of the Circuit Court of Appeals, concurred in by the learned Chief Justice of this Court, who presided in the Circuit Court of Appeals when these cases were argued, affirming the interlocutory orders of the Circuit Court, was so clearly correct, this Court could do

nothing more than approve the decision of the Circuit Court of Appeals, even if the cases were reviewed by certorari, and under such circumstances the petition should not be granted.

Respectfully submitted,

GEORGE B. LESTER,
ALFRED S. BARNARD,
Counsel for Respondent, The Fleischmann Co.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 625.

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, et al., *Petitioners.*

Versus

WILSON DISTILLING CO. et al., and THE FLEISHMANN CO., *Respondents.*

Argument of Clifford L. Anderson, Thomas B. Felder and Daniel W. Rountree, for Petitioners.

ARGUMENT FOR PETITIONERS.

In addition and supplemental to the briefs which have been filed in behalf of the Petitioners in the above stated cause, we desire to submit to the Court the following argument, in support of the contentions of the Petitioners in certiorari.

The questions which we desire here to discuss may be briefly stated as follows:

1.

Did the Act of the General Assembly, approved Feb-

ruary 16, 1907, providing for the appointment of a Commission to wind up the affairs of the South Carolina State Dispensary, create a trust in favor of the creditors, whose claims arose out of the operations of the South Carolina State Dispensary, capable of enforcement in a Court of Equity?

2.

Were the suits brought by the Wilson Distilling Company, et al, and The Fleishmann Company against the Dispensary Commission in effect suits against the State of South Carolina, or if not technically so, was the State of South Carolina an indispensable party, so as to render the Circuit Court of the United States for the District of South Carolina, without jurisdiction of the cases, by reason of the inhibition contained in the Eleventh Amendment of the Constitution of the United States?

3.

Ought the decision of the Supreme Court of the State of South Carolina construing the statute above referred to of 1907, and the amendment thereto passed in February, 1908, to control the Federal Court in determining the scope and meaning of those statutes, so far as that decision determines questions one and two?

4.

Did the case made by the bills filed, answers made to the return and evidence submitted, justify the Circuit Court of the United States for the District of South Carolina, sitting as a Court of Equity, in granting the relief prayed for, and in passing the orders granting an injunction against the Dispensary Commission, and appointing Receivers for the funds in its hands?

FIRST QUESTION.

In discussing this question it will be profitable, we think, to briefly consider the history of the legislation in the State of South Carolina, relating to its Dispensary.

In 1892, the General Assembly of that State, by enactment, forbade any person from manufacturing or dealing in intoxicating liquors of every character, within the State of South Carolina, and provided that the State alone should have the right to sell such intoxicating liquors within its borders. In pursuance of this plan of dealing with the liquor question, it created a State Dispensary, providing the machinery necessary for conducting the liquor business in the State, through officers of the State. These officers were authorized under the law to buy supplies of liquors of every kind and character from persons dealing in these commodities, and to sell such liquors under the limitations and restrictions contained in the enactment. The credit of the State alone was pledged to the payment of the liabilities which might be incurred by the officers conducting the State Dispensary, and debts which might be created by these officers in the purchase of liquors were the debts of the State, collectable just as other debts against the State might be collectable.

No provision was made for the enforcement of debts of this character against the State, or against the Dispensary, or against the officers in charge of the Dispensary, and all persons who dealt with the State in selling liquors to it, for use in its Dispensary, depended upon the good faith of the State alone for the payment of any obligations which might become due to them, and arising out of such sales.

The Constitution of South Carolina of 1895, expressly

provided for this control of the liquor business in the State, and the General Assembly of the State shortly after enacted a new Dispensary law, changing the former law in some minor particulars, but keeping in force the main scheme, originally contemplated and provided for.

On the 16th day of February, 1907, the General Assembly of the State of South Carolina abolished the State Dispensary system, and repealed all laws relating thereto.

It is perfectly clear that had matters been allowed to rest here, persons who had sold liquors to the State for use in its Dispensary, and to whom balances were still due on account of such sales, were relegated as a sole remedy for the collection of their claims, to such disposition thereof as might be made by the State acting through its Legislative body. No such creditor would have had the right to sue upon his claim in any Court, nor could that right ever accrue to him until the State of South Carolina by enactment of its General Assembly, had consented to the bringing of such a suit; for the Constitution of that State expressly provides: "The General Assembly may direct by law in what manner claims against the State may be established and adjusted." And the Eleventh Amendment of the Constitution of the United States of America, prohibits the bringing by any citizen of a suit of any kind whatsoever, against a sovereign State of the United States, without that State's consent, and that consent can be expressed only through the legislative branch of its government.

But on the 16th day of February, 1907, the General Assembly of the State of South Carolina also passed an Act which was entitled

"An Act to provide for the disposition of all property

connected with the State Dispensary, and to wind up its affairs",

and it is contended by the creditors who brought the suits in the Circuit Court of the United States for the District of South Carolina, upon which the interlocutory decrees were entered, which are here sought to be reviewed, that this Act of the General Assembly of South Carolina, created a trust in favor of the creditors of the State, whose claims arose out of the operations of the State Dispensary, whereby and whereunder they became directly interested in the funds which came into the hands of the Commission, provided for in this Act, in the enforcement of which the aid of the Court can be invoked.

In order to determine the correctness of this contention, let us analyze the Act in question. What was its purpose? Did the Legislature intend by this Act primarily to provide a method of paying the claims against the State, growing out of the State Dispensary operations, or was the payment of such liabilities a mere incident to the main scheme of the enactment?

The title of the Act declares its purpose to be "to provide for the disposition of all properties connected with the State Dispensary, and to wind up its affairs."

The State owned a large amount of assets connected with its Dispensary. These assets consisted of liquors and other personal property, and of debts due to the State by various persons, and subdivisions of the Government, arising in the course of the operation of the business of the Dispensary. It was highly important that these assets should be reduced to money. It was absolutely necessary that some machinery be provided to accomplish this purpose, and that capable, upright persons should be placed in charge, in order that the assets

should be made to realize the largest amount, and generally that the interests of the State might be wisely and honestly protected. The assets in question were the property of the State, and the money which might be realized therefrom continued to be the property of the State.

The Commissioners provided to be named in said enactment were the agents and representatives of the State, exercising delegated and limited authority, and acting entirely in behalf of the State of South Carolina. The duties of this Commission, broadly stated, were to wind up and investigate the affairs of the Dispensary Commission. The selling of the property connected with the Dispensary, and the paying of the liabilities arising out of the Dispensary were mere incidents to the general purpose; necessary to be done, of course, to carry out the main scheme, but in no sense was the payment of the liabilities the primary end which the General Assembly had in view in passing the Act, and in providing for the creation of the Commission. As to whether or not the Commission itself has the power to determine that a debt is just or unjust, is a matter of no importance. If the Legislature by this enactment did not confer this power upon the Commission, it did not part with the right to determine this question at all, but the exclusive right of the General Assembly to determine whether an obligation of the State is just or unjust still rested in that Body, and if a dispute arose between the Commission and alleged creditor of the State, as to the justness or unjustness of the creditor's claim, the creditor's sole right under this enactment of the General Assembly of South Carolina is to apply to the Legislature for relief. (1)

The learned Circuit Court of Appeals holds that this

(1) R. R. Co. vs. Hecht
95 U. S. 170.

Act of the General Assembly of South Carolina did create a trust for the benefit of creditors, and says:

> "The provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust, for the benefit of creditors. There are the necessary three parties: The Trustor, the Trustee, and the Cestui que trust. The State acting through the Legislature, passes the title and possession of certain property to the five appellants, who are constituted a Dispensary Commission. The direction is that the appellants take this property, sell it, collect debts, and when the proceeds are in hand, pay off the just liabilities of the State Dispensary.
>
> The Act then provides for the payment of certain expenses incident to the discharge of the duties devolving upon the Commission, and after that the residue to be paid to the State.
>
> We undertake to say that there is scarcely to be found recorded anywhere, an assignment by a debtor for the benefit of creditors more intelligently constructed or more readily understood."

This statement by the learned Court is ingenious, but is not borne out by analysis of the Act. It is particularly erroneous in two particulars: In stating (1) that the Act in question passes title as well as possession of the property to the five Commissioners. (2) That the provision that the Commissioners, after paying the expenses incident to the discharge of their duties and the liabilities of the Dispensary, shall pay the residue to the *State.*

It does neither of these two things. Certainly by no express language contained in the Act does it pass title in the property to the Commissioners, nor does it impliedly do so. The Act lacks one of the most essential elements of an assignment for the benefit of creditors or

the creation of a trust estate. *It makes no conveyance of the property.*

All that it does is to confer power of attorney upon agents, created by its terms to deal with property belonging to the State, and the title to which still remains in the State. The agents are merely instructed to take property, the title to which remains in the State, and by virtue of the power of attorney conferred upon them, to convert this property into money, and after they have ascertained and determined to their own satisfaction what may be the just liabilities of the State growing out of the operation of its Dispensary, to pay those liabilities, and to pay also other expenses which may be incurred in the discharge of their duties, holding and keeping possession of the funds thus realized until all the duties imposed upon them have been discharged, and then, not to pay over to *the State* the residue, but to transfer the unexpended balances in their hands from them, special officers of the State, to the *State Treasurer,* another officer of the State; the regular custodian of the State's funds.

The Act does not contemplate either an assignment or trust, but a liquidation, and that liquidation to be made by the State through its own officers. The Act of the General Assembly of the State of South Carolina in thus providing for the liquidation of the business of the State Dispensary, may be analogized to a resolution by the stockholders of a solvent private corporation, directing the President of the Corporation to appoint a Committee from their own number, to wind up the affairs of the corporation, to reduce all of its assets to money, ascertain its liabilities, and after paying the expenses incurred in and about the duties to be performed by them, and discharging the just liabilities ascertained by them to be

due, to distribute among the stockholders the residue of funds in hand. In such a case the corporation does not part with the title to its property, and does not lose control over the administration of its affairs. The Committee so appointed are mere agents of the corporation, to audit its accounts, collect in its assets, and wind up its affairs, and should the stockholders at any time after the passage of such a resolution be dissatisfied with the manner in which the Committee in question is discharging its duties, the corporation, through its stockholders, still reserves the right to modify or limit the powers of this Committee, or to revoke their powers entirely, and to proceed with the liquidation through its own corporate acts, or through the aid of such other machinery as they may see fit to provide for. In no sense would such a resolution create a trust or an irrevocable agency, which the creditors of the corporation would have the right to invoke the aid of a Court of Equity to enforce. The rights of those creditors would be as they always were, the right to sue the corporation for the recovery of their debts; for the mere process of liquidation would not terminate the corporation's existence, or render its assets no longer subject to judgments properly rendered against it.

The present case does not differ in principle from this, and differs in fact only that the creditor may not sue the State of South Carolina, because of the immunity from suit granted to it by the Federal Constitution, but this is a risk that the creditor took when he dealt with the State, and does not change the rule of law.

Indeed, one may easily surmise that this very lack of remedy or rather lack of right to sue the real debtor, has

lead the Circuit Court and the Circuit Court of Appeals to wander away from the paths of legal rectitude, in the effort to aid the creditor to obtain a judicial determination of his rights.

This Court has already decided, in a case bearing many marks of similarity to the one at bar (the case of Florida vs. Anderson, 91 U. S., pp. 667 to 690), where the Legislature of the State of Florida, by enactment created the "Internal improvement fund of the State of Florida," and vested the absolute title of that fund in a commission composed of the Governor, the Comptroller, the Treasurer, the Attorney General, and the Registrar of State lands, and their successors in office, "in trust to dispose of the same, and invest the proceeds; with power to pledge the fund for the payment of interest on the bonds which might be issued by any railroad companies constructing roads on lines indicated by the Act", that the trustees were merely agents of the State, invested with the legal title of the lands, for their more convenient administration. The Court in that case, says:

> "From the statement already made in reference to the history and character of this fund, and the duties of the trustees in regard to it, it is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration, and that the State remains in every respect the beneficial proprietor, subject to the guarantees which have been made to the holders of railroad bonds, secured thereby. The residuary interest in the fund belongs to the State. The fact that the trustees consist of the Governor and other Executive officers, and that they are charged with the duties of drainage, reclamation and settlement of the public lands (duties of a purely public character), shows that they are mere public Agents, invested with an important branch of the State administration."

So that, it being conceded for the sake of argument that the effect of the Act of February 16, 1907, was to vest the title to the State Dispensary property in the Commission, and to render them trustees in a certain sense, they became trustees for the State, and no one else; the State remaining the beneficial proprietor. The Commissioners were the mere agents of the State, exercising rights in the property for its more convenient administration, and the fact that the Commissioners are charged with the duties not only of closing out the entire business and the property of the State Dispensary, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof to all just liabilities, at the earliest date practicable, but by Section 8, of said Act, are invested with the power and authority to investigate the past conduct of the affairs of the Dispensary, together with the power and authority conferred upon a certain Committee of the Legislature, under an Act approved January 24, 1906, which includes the right to withhold the payment of any claims against the State Dispensary, which they may deem advisable, until the same is duly proven by production of the books of original entry, etc., etc., shows that they are mere public Agents, charged with the performance of an important public duty.

See also Railroad Companies vs. Schutte, 103 U. S. 118;

Littlefield vs. Improvement Fund Trustees, 117 U. S. 419;

Vose vs. Trustees, 1st Woods, 647;

Vose vs. Trustees, 2d Woods, 647;

Union Trust Co. vs. Southern Inland Navigation Co., 130 U. S. 567.

But much reliance has been placed by the opposing Counsel and by the Court of Appeals upon the case of McKee vs. Lamon, 159 U. S., Page 322, and the language of the Court there appearing, which follows:

> "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee, to devote it to the purposes intended by bailor."

When that expression of the Court is considered in connection with the facts of the case then under consideration, it is seen that it in no wise militates against the conclusions for which we are now contending.

The Choctaw Nation had contracted to pay a certain percentage for services rendered to it in procuring a certain sum from the Government of the United States, claimed to be due to that Nation. The services had been rendered, the money had been appropriated by Congress, and paid over to the Choctaw Nation. The percentage of this money to be paid to certain persons for their services rendered, had been paid into the hands of McKee under an agreement that McKee should hold the money as Trustee for the persons who had rendered the services, and should distribute it in accordance with their several claims against it. The Choctaw Nation having parted with the money, and McKee having received it, the Choctaw Nation had no further interest in it, either direct or indirect, present or residuary. The Choctaw Nation was not even interested in ascertaining who was entitled to the fund, or whether the claimants against the funds

had just claims or unjust claims. McKee was in no sense an agent of the Choctaw Nation, but became distinctly and admittedly the agent or trustee for the persons entitled to divide the fund. McKee had no duty to perform other than the mere payment of the money to those entitled to receive it. McKee was under no obligation to account to the Choctaw Nation in any manner, for his actings and doings. He was not under bond to the Choctaw Nation for the faithful performance of his duties. His position in the matter bore no resemblance to that of the Commission appointed under the Act of February 16, 1907, for winding up and investigating the State Dispensary business in South Carolina.

The State Dispensary Commission of South Carolina is accountable only to the State. Each Commissioner was required to give a bond to the State under the terms of the Act, for the faithful performance of his duties, included in which was the duty to pay no debt that was not a just debt.

The Dispensary Commission were agents of the State, exercising delegated legislative powers, subject to the control of no one else, except the State, acting through its Legislature, and subject at all times to the will and direction of that Body. In short, the facts disclose that in the one case the custodian of the money was acting as agent for the creditors, and in the other case as agent for the debtor, with the agency in the first case confined strictly to the duty of paying over certain moneys to those entitled to it, and in the second case, where the principal purpose of the agency was to wind up and investigate the Dispensary business, and incident thereto to pay off the just liabilities.

The holders of just liabilities against the State of South Carolina, whose claims arose out of the Dispensary business, acquired no new or larger rights after the passage of the Act of February 16, 1907. They were always entitled to have their claims paid, but that right accrued before this Act was passed. Nothing has been done by the creditor upon the faith of the Act of February 16, 1907, which will impart to his claim a new contractual value. Therefore no rights accrued under that Act of the General Assembly, which precluded the General Assembly from further dealing with its own property in the hands of its own Commission. Unless, therefore, under the provisions and by virtue of the powers conferred upon them in the Act of February 16, 1907, the Dispensary Commission had entered into contracts based upon good and valuable considerations arising since the passage of said Act, the Legislative control over the funds in their hands, has never been in the slightest degree impaired, and the General Assembly of the State of South Carolina had the right at any time to modify or alter, enlarge or decrease, the powers of this Commission, or to revoke the enactment entirely, if in their judgment it was deemed best. So that, if after the bills were filed in the pending cause, and before any judgment was rendered thereon, the General Assembly of the State of South Carolina, passed an amendatory Act as they did in February, 1908, making more certain the powers of the Commission, and vesting in that Commission the sole right to determine the question as to whether a debt against the State Dispensary was just or unjust, that legislation should be given full force and effect by the Court, even in the pending cause.

SECOND QUESTION.

It is not our purpose here to carefully analyze all of the decisions which have been made by this Court as to when a suit may be brought against officers of a State, without its being regarded as a suit against the State, or when such a suit will be so regarded. Suffice it to say that a careful consideration of them all discloses that there is really no conflict between them and that the rule upon the subject is well defined and clear.

In a general way, the rule as it applies to the case at bar may be stated to be as follows:

That where the officers are performing a mere ministerial duty without any discretionary powers, and they either attempt to act contrary to their powers or refuse to exercise them, a person injured may invoke the aid of Court having jurisdiction, because it is not the State so acting, but it is the officers who are acting contrary to the law of the State, and not in pursuance of it; but where the State has conferred upon its officers any discretion in the exercise of the duties imposed upon them, their exercise of that discretion is the act of the State, and a suit against them attempting to control that discretion, is a suit against the State. Tested by this rule, this case is clearly one against the State of South Carolina.

The contention of the Counsel representing the Respondents, and the foundation of the decision rendered by the Circuit Court of Appeals, as well as the Circuit Court, is that the creditors have a right to proceed against the Commission for the purpose of having a judicial determination of the validity and justness of their claims. It is not contended that by the Act of February

16, 1907, the General Assembly of the State of South Carolina, either directly or indirectly consented that the State could be sued, so that the determination of this question rests as above suggested, upon the question as to whether or not a suit against these officers, that is to say, the Dispensary Commission, is, in effect, a suit against the State, because these officers are exercising a ministerial duty without discretion, and have refused or failed to perform that duty.

In the first place, by the Act of February 16, 1907, the power and authority was conferred upon the Dispensary Commission, to determine for themselves whether a debt was a just or an unjust debt, before paying it. Indeed, there can be no other reasonable construction put upon the Act. It is expressly provided in the Act that the Commission shall pay all of the just liabilities out of the funds coming into their hands. Unless the Commission has the implied right to determine the question as to whether a liability is just or unjust, how is it going to perform this duty at all? The Commission can not presume that every liability claimed is a just liability. It must be invested with some power to investigate and determine the question of its justness or unjustness. It has no power to pay a debt that is not a just liability. It must be intended that the Commission shall have some way to determine the question of justness in connection with the liabilities. It is clearly not contemplated that the Commission shall seek elsewhere than in its own Council for a decision as to whether a given debt is just or unjust. The very duty imposed upon the Commission to pay a just liability, and only a just liability, must include the right to determine in the exercise of its judgment and discretion, whether the debt in question is just

or unjust. Having once determined that question, then its power becomes absolute, and its duty becomes plain, but it must always first exercise that judgment and discretion, before it is called upon to perform any other duty at all. This is made clearer by a consideration of other parts of the Act of February 16, 1907, and by a consideration of all of the legislation on the subject preceding this enactment. It is clear from an examination of the legislation upon the subject, that the Legislature was impressed with a doubt that the affairs of the Dispensary had been honestly conducted prior to its abolition on February 16, 1907, and believed there had existed a conspiracy or conspiracies between the venders of liquors and the State's purchasing agents, by virtue of which the State had been defrauded of large sums of money. Whether the claims of certain creditors of the State arising out of the Dispensary were just or unjust was therefore, a question of grave doubt in the Legislative mind. The very employment of the word "just" in connection with the payment of liabilities in the third section of the Act of February 16, 1907, indicates a legislative doubt on this subject. Ordinarily it would have been sufficient to say that the Commission should pay all liabilities because that term alone necessarily means obligations for which the State is legally and unquestionably liable, but in order that the Commission might be impressed with the necessity of carefully investigating the liabilities arising out of the Dispensary business, it was expressly directed to pay only the *just* liabilities. But this is not the only provision in the Act throwing light upon this subject. Section 8 confers upon the Commission full power and authority and consequently imposes upon it, the duty to investigate the past conduct

of the affairs of the Dispensary. This duty necessarily includes an investigation of the transactions between the State's representatives conducting the Dispensary and the vendors of liquors, who had dealt with them. If, by reason of this investigation, it is disclosed that a certain claim against the State is impregnated with fraud and injustice, it would then become the plain duty of the Commission to decline to pay the claim, perhaps to decline to pay it in toto, though only partly unjust, leaving it to the General Assembly of the State to determine what further disposition should be made of it. But in connection with the power to investigate the past conduct of the affairs of the Dispensary, the Legislature expressly conferred upon this Commission all the power and authority which had been previously conferred upon a Committee of the Legislature, also appointed to investigate the affairs of the Dispensary, in an Act of the General Assembly approved the 24th of January, 1906; and in the power and authority contained in the Act just referred to, was included the right to decline to pay any claim until the creditor had produced all his books, papers and correspondence connected with and leading up to the transaction with the State, and show to the satisfaction of the Commission a clean record in his dealings. Clearly, therefore, this Commission is an administrative body, invested with certain discretionary powers, and particularly a discretion relative to the question as to whether a liability of the State growing out of the Dispensary is just or unjust, and under the rule above referred to, the Court has no right to exercise that discretion for the Commission, and any suit which may be brought against them, intending to force the Commission to exercise this discretion one way or another, or seeking to take away

from it that discretion and place it with the Court, is a suit against the State because it is the discretion of the State exercised through its officers, that is sought to be interfered with, and not the act of the officers themselves, in the performance or non-performance of a pure ministerial duty.

But if, for the sake of argument, it be conceded that the Dispensary Commission had no discretion to determine whether a liability was just or unjust, the creditors are in no better situation by reason of that fact.

In order to enable them to invoke the aid of a Court of Equity against these officers, without having the jurisdiction of the Court ousted upon the ground that it is in effect a suit against the State, it is imperative that the plaintiffs in those suits show that it is necessary for the Court to maintain its jurisdiction in order to protect private rights, by requiring State officers to perform a plain ministerial duty imposed by law.

And this is what they say they are seeking to do; but how are their private rights to be protected in this way, if the ministerial officer has no right to determine what is a just debt; because if this is true, the ministerial duty imposed upon him can not be exercised.

Indeed, if they have no such discretion, the Act is fatally defective in failing to provide how the justness of the debt may be ascertained. The Court can not force the State officers to perform a ministerial duty which is not imposed upon them, nor in the absence of an express grant on the part of the State to the creditors to bring suit against either the Commission or the State for the purpose of ascertaining whether their debts are just or

unjust, the Court has not jurisdiction for the sole purpose of determining this question.

In effect, the contention is that though the Court has the power only to compel the performance of a plain ministerial duty, in order to exercise that power, it will first determine a question which was not one of ministerial duty to be performed at all, that is to say—that by a suit against the Commission, who have nothing to do with the question as to whether the State justly owes the debt or not, to which the State is not a party, and in the defense of which the Commission is under no duty, the Court will determine the rights of the creditors and the State respectively, and having thus determined what are just liabilities, force the Commission to perform its duty. A mere statement of the proposition is sufficient to make clear that a suit having for its real purpose the determination of the question as to whether the liability is a just one, is a suit against the State. The liability is the State's, not the Commission's.

Of course, what we have just said relates entirely to the Act of February 16, 1907, but whether our contention as to it is correct or not, surely the Act of February 24, 1908, amending the first Act mentioned, removes all doubt about the question.

Under this Act it is clearly the duty of the Commission to investigate and determine whether a liability is just or unjust, and no Court can take away that discretion and power from it, and no suit can be brought against the Commission, the object of which is to interfere with the exercise of that discretion and power, which is not inhibited by the Eleventh Amendment of the Constitution of the United States.

We apprehend that no dispute would be made as to this proposition, if it were not for the contention of respondents that certain rights accrued to the creditors under the Act of February 16, 1907, which could not be impaired by the passage of the Act of February 24, 1908, but as we have before seen, the passage of the Act of February 16, 1907, created no new contract between the creditors of the State, and it does not appear that any creditor has acted to his harm or detriment on the faith of this enactment, and unless this is so, the power of the Legislature over the subject matter is unaffected.

As stated by Mr. Chief Justice Taney, in the case of Beers vs. Arkansas, 20 Howard 527, when the State had given its consent to being sued, and suits were pending:

> "It may withdraw its consent whenever it may suppose that justice to the public requires it."
>
> See also; In re Ayers 123 U. S. 505;
>
> City of Sioux Falls vs. Farmers Loan & Trust Co., 136 Fed. 721, 731;
>
> Royston vs. Miller, 76 Fed. 50, 53;
>
> Levy vs. Stockclager, 129 U. S. 470, 477, 478.

But in any event the State is an indispensable party to the suit, and since it can not be made a party by reason of its immunity from suit under the Federal Constitution, the jurisdiction of the Court must fail.

The learned Judge rendering the decision for the Circuit Court of Appeals, uses this expression:

> "The fund being in the hands of the Commission charged with this duty (of paying the just liabilities) the State has no interest in so much thereof as is necessary to pay the just debts. Then how can it infringe any right of the State to have the true amount of the debts due by the defunct Dispensary, judicially ascertained."

But, is it true that the State has no interest in so much of the fund as is necessary to pay the just debts? Whose debt is in controversy? Has a debtor no interest in the determination of the question as to whether the debt claimed against him is just or unjust? Is no right of the debtor infringed by the determination by a Court that his debt is a just debt, without his day in Court? It is never to be presumed that a Court with all the facts before it, will not rightly determine the issues between parties, but if it may enter into the determination of these issues, without having the interested parties before it, the absence of the parties would never be a matter of importance, and no Court would decline jurisdiction for the want of parties. The very object of having the parties before the Court, who are really interested in the controversy, is that the Court may be informed of the contentions of both parties, and may consider the facts that each party may be able to adduce.

The rule is that all persons materially interested, either legally or beneficially in the subject matter of the suit, are necessary parties to it.

> Minnesota vs. Northern Securities Company, 184 U. S., Page 199.

It was also held in the case of Florida against Anderson, 91 U. S., Page 676, already referred to in this argument, that the State of Florida had such an interest in the "Internal improvement fund" there under consideration, as to entitle it to file an original bill in the Supreme Court of the United States (which alone the State could do) when the interests of that fund were involved.

THIRD QUESTION.

It is a well established rule of this Court that the construction by a Court of last resort of a State, of a statute of that State, will be accepted by the Supreme Court of the United States as controlling.

The decisions of this Court to this effect are so numerous that it would not be profitable to even attempt to cite them all, nor quote from them all at length, but a reference to a few of them will not be out of place at this point.

In the case of Wilson v. North Carolina, 169 U. S. page 593, the Court says:

> "The highest Court of the State has held that this statute was not a violation of the Constitution of the State, that the hearing before the Governor was sufficient, that the office was substantially an administrative one, although the Comimssion was designated, by a statute subsequent to that which created it, a Court of record, that the officer taking office under the statute was bound to take it on the terms provided for therein, that he was lawfully suspended from office, and that he was not entitled to a trial by a jury upon the hearing of this case by a trial court.
>
> "As a result, the Court held that the defendant had not been deprived of his property without due process of law, nor had he been denied the equal protection of the laws.
>
> "The controversy relates exclusively to a title to a State office created by a statute of the State, and to the rights of one who was elected to the office so created. These rights are to be measured by the statute, and by the Constitution of the State, except in so far as they may be protected by any provisions of the Federal Constitution."

"Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of the State, this Court follows the construction given to these instruments by the highest court of the State. The exceptions to this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the Supreme Court of North Carolina as to the proper construction of the statute itself, and that as construed, it does not violate the Constitution of the State."

In Hartford Fire Insurance Company v. Chicago, etc. Railway Company, 175 U. S., page 100, this Court says:

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—one not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application—are governed by the law of the State, as expressed in its own Constitution, or statutes, or declared by its highest Court."

In the case of Forsyth v. Hammond, 1566 U. S., page 520, this Court says:

"The case of Burgess v. Seligman is largely relied upon in the opinion of the Court of Appeals, but there are several reasons why that authority does not justify its action. In the first place the decision of the Supreme Court of the State was rendered before the filing of this bill in the Circuit Court of the United States, and not as in the Burgess case after the judgment in the Circuit Court. In the second place the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal Courts."

And in the case of the Western Union Telegraph Company v. Poe, decided by Judge W. H. Taft, sitting in Circuit, and reported in 64 Federal Reporter, page 9, the Court says:

> "Where a Federal Court decides, on demurrer, that a State statute, the validity of which has never been passed upon by the highest Court of the State, is in violation of the Constitution of such State, and afterwards, but before a final decree is entered in the Federal Court, the State Supreme Court decides that such statute is constitutional, the Federal Court will reverse its former ruling in deference to the decision of the State Court."

In the State Railroad Tax cases, 92 U. S. 575 to 618, the Circuit Court of the United States had held that an Illinois tax law was invalid, because in violation of the State Constitution, a final decree having been entered to this effect. The case was appealed to the Supreme Court of the United States. After the final decree in the Circuit Court of the United States, but before the case was reached in the Supreme Court of the United States on appeal, the Supreme Court of the State of Illinois decided that the law was valid, and not violative of the State Constitution. This being called to the attention of the Supreme Court of the United States, that Court reversed the decision of the Circuit Court, Mr. Justice Miller using the following language in connection therewith:

> "But if for no other reason, we should reverse the decrees of the Circuit Court in these cases, because the same questions, involving the same considerations urged upon us here, have been decided by the Supreme Court of the State of Illinois in a manner which leads to the reversal of these. As the whole matter concerns the validity of a State law, as affected by the Constitution

> of the State, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this Court still holds, with some few exceptions, that the decisions of the State Courts are to be accepted as the rule of decision for the Federal Courts. It is nevertheless a satisfaction that our judgment concurs with that of the State Court, and leads us to the same conclusions."

To the same effect was the decision by this Court in the case of Snyder v. Williamson, 24 Howard, 127, and in the case of Fairfield v. County of Gallatin, 100 U. S., page 47.

The statute of February 16, 1907, involved exclusively matters connected with the internal administration of the affairs of the State of South Carolina.

The matters involved were: the winding up and the investigation of the affairs of the State Dispensary, in connection with which the Commissioners appointed under the Act were required to collect in all of the assets growing out of the business done by the State Dispensary, and to disburse the same in accordance with the provisions of the Act. The assets and money so to be disbursed were the assets and money of the State of South Carolina. The debts to be so paid were the debts of the State of South Carolina The debts grew out of contracts made and to be performed in the State of South Carolina. The matters dealt with in the Act are not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or general jurisprudence of national or universal application, but were and are governed entirely by the Constitution and laws of the State of South Carolina. The construction of the Act of February 16, 1907, involved

questions of a purely local nature involving the internal policy of the State.

No constitutional question is involved in the suits brought by the creditors against the State Dispensary Commission; that is to say, no relief is sought by the complainants in these suits which require the determination of any Federal question. The only Federal question which is raised in the litigation is one which is raised by the Dispensary Commission, which goes only to the jurisdiction of the Court. The determination of the validity of the contracts between the creditors and the State of South Carolina, the determination of the justness of the claims made by these creditors against the State of South Carolina, the determination of the powers and duties of the Dispensary Commission, under the provisions of the Act of February 16, 1907, are all of a local nature, dependent upon the Constitution and laws of the State of South Carolina, and in no wise involving the application of the Constitution of the United States, or any of the Federal laws. Clearly, therefore, it is a case in which the rule laid down by this Court, relative to the conclusiveness of the decision of the State in question, applies.

The case of Burgess v. Seligman, 107 U. S., page 33, is relied upon by the Circuit Court of Appeals as supporting the conclusion reached by it that the decision of the Supreme Court of South Carolina, interpreting the decision of the Act of February 16, 1907, should not be controlling upon the Federal Court. But this case is not in point: first, because the final decree in that case had been rendered before the Supreme Court of the State made its decision upon the same subject, and second, because the matters involved in the case of Burgess v. Selig-

man were not purely and exclusively of a local nature, involving the internal policy of the State, but clearly involved questions of general jurisprudence.

In the case at bar, no final decree has been rendered by the United States Circuit Court, but an interlocutory order only. The case is still a pending cause; the final disposition of it is still within the control of the Court; the questions involved in the case have not been adjudicated between the parties; nothing has been done which is final.

A timely application was made to the Circuit Court below by the Dispensary Commission, to revoke the interlocutory orders which had been passed in the pending cases, because of the decision made by the Supreme Court of South Carolina, involving the same questions. Which was denied; and one of the assignments of error made in the case was the refusal of the Court to revoke these orders, when this motion was made.

Under the rules of law above stated, supported by the authorities above quoted, it was the duty of the Circuit Judge, upon the making of this motion, to have accepted the decision of the Supreme Court of South Carolina upon the questions involved, and to have revoked his orders and dismissed the bill.

It is true that the Supreme Court of South Carolina, in the decision rendered by it, held, among other things, that the suit by these creditors against the Dispensary Commission was in effect a suit against the State, and inhibited by the eleventh amendment of the Constitution of the United States. But even if we eliminate that feature of the decision from our present consideration, in so

far as it should be binding upon the Federal Court, the decision also disposed of the vital question in this case, and the one upon which the complainants in the Court below rested their case, namely: that the Act of February 16, 1907, created a trust in favor of the creditors of the State, growing out of the Dispensary, which a Court of Equity had the right to enforce. Now, as to whether this Act did create a trust, depends upon the construction which is to be given it, in the light of the laws and the Constitution of the State of South Carolina, and the Supreme Court of South Carolina has rendered a deliberate judgment that this enactment did not create a trust, was not intended by the Legislature to have this effect at all, but that the Commissioners provided for in said Act were mere agents and officers of the State, acting for and in behalf of the State.

It is conceded by the opposing counsel, and by the Circuit Court of Appeals, that if the Act of February 16, 1907, did not make the Commission trustees, and create a trust in the fund in hand, in favor of the creditors whose claims arose out of the operation of the State Dispensary, the Circuit Court of the United States, sitting in Equity, would have no jurisdiction of the case. Therefore, whatever else may be said with reference to the other questions which have been raised in this case, if the decision of the Supreme Court of South Carolina must be followed upon this question, then the decision of the Circuit Court of Appeals is erroneous, and the original bills should be dismissed.

But this Court, in the case of Osborne v. Florida, 164 U. S., pp. 650 to 656, accepted the ruling of the Supreme Court of Florida in the construction of the statute of that State, even though the effect of that ruling

was to decide that the statute in question did not contravene the Interstate Commerce Clause of the Constitution of the United States.

It is contended, however, that the decision in the Supreme Court of South Carolina was the result of a collusive suit brought for the purpose of having that Court decide the questions involved in this case, so as to affect its final disposition. Such was the contention made in the case of the Western Union Telegraph Company v. Poe, 64 Federal Reporter, pp. 11 and 14, but Judge Taft, in disposing of that question, there rightfully holds that though it appear that the case was a test case brought before the Supreme Court of the State in a summary way; though it appear that it was brought in the State Court in order to anticipate the determination of the questions pending in the Circuit Court of the United States, and though all the facts tended to show the friendly character of the proceeding, it also appearing that the opinion of the Supreme Court of the State was made after argument and the filing of printed briefs, and that the Supreme Court of that State regarded it not as a moot case, but one calling for consideration by them, due respect for the judgments of the Supreme Court of Ohio made it indelicate for that Court to question the propriety of such a ruling in respect of a case plainly within its jurisdiction.

See also, Adams Express Company vs. Ohio, 165 U. S. 219.

FOURTH QUESTION.

According to the contentions of the complainants in the Circuit Court below, and according to the decisions

rendered by the Circuit Court and the Circuit Court of Appeals, granting the interlocutory orders prayed for by the plaintiffs in said suits, the right of the complainants to seek the aid of a Court of Equity is predicated exclusively upon the proposition that the Act of the General Assembly of South Carolina, of February 16, 1907, created a trust in the Commissioners appointed under the provisions of that Act as to the fund coming into their hands, in favor of the creditors whose claims arose out of the operations of the State Dispensary, and that those creditors were entitled to seek the aid of a Court of Equity in order to enforce the terms of that trust. The only issue alleged to exist between the complainants and the Dispensary Commission is as to whether the complainant's debts are just or unjust, and the aid of the Court is invoked primarily to determine that question, in order, if it be determined in favor of complainants, that, this question being established, the Dispensary Commission may have no further cause for declining to pay their claims. It is not alleged or shown that if the claims are established to be just claims, the Commission would refuse to pay them.

It is alleged that there is some danger that the funds will pass out of the hands of the Commission and out of the jurisdiction of the Court, by virtue of some contemplated legislation in the Genera Assembly of South Carolina, but the facts disclosed by the record are that the legislation feared did not undertake to remove the funds from the hands of the Commission, or to prevent the payment of a just claim, and if that legislation is void, in so far as it affects the rights of the complainants—and to support the decision of the Circuit Court of Appeals it must be so regarded—it is a matter of no importance

whether such hostile legislation be contemplated or not. There is no direction in the feared legislation that the funds shall pass out of the hands of the Commission, and there is no allegation or proof justifying the conclusion that it is the purpose of the Commission, or of the Legislature of South Carolina, at any time to pass the funds out of the hands of the Commission, so that it would not be reached by the decree of the Court.

The complainants, therefore, if they have a right to sue the Commission at all, have adequate remedies at law. It is only necessary that they shall sue the Commission at law on the claims made by them against the State Dispensary, and obtain a judgment establishing the validity and amount thereof, in order to fully protect their rights. Why should a court of equity interfere in the matter? What equitable relief are complainants in the suits pending below entitled to? What other thing need they do than to establish their claims as just liabilities? Does there appear to be any danger of waste of the funds in the hands of the alleged trustees? Does there appear to be any danger of a misappropriation of the funds in the hands of the alleged trustees? Does there appears to be any abuse of power on the part of the alleged trustees? Does there appear to be any failure on the part of the alleged trustees to execute the trust? If a trust was created by the Act of February 16, 1907, it limited the power of the trustees to the payment of just liabilities, and there is no issue between them and the creditors except the determination of that question. There is no failure to execute the trust, if they refuse to pay the liabilities because they are not just liabilities, and if the Court has the power of determining that issue between the creditors and the Commission, it is not a court

of equity that must be called upon to determine it, but a court of law.

As to some of the creditors who appear either as original complainants or intervenors in one of the two cases, it does not even appear that they had ever submitted their claims to the Commission for consideration, or that the Commission had ever denied that they were valid and subsisting and just liabilities, or that they had ever refused to pay them.

In no proper sense is this a suit by and in behalf of creditors generally, or beneficiaries generally. The Commission might, and the record shows that they did, recognize a large number of claims as just liabilities. The justness or unjustness of each particular creditor's claim stands upon the particular facts applicable thereto. There is no general state of facts applicable to all of them, but each creditor must stand or fall upon the merits of his own contention. A bill in equity will not be entertained for the purpose of avoiding a multiplicity of suits, unless all the suits are predicated upon practically a common cause of action.

Unless the procedure at law is incomplete or inadequate, a court of equity will not interfere, unless the Trustee either refuses to act, or acts in excess of or in abuse of his power; and even then danger to the trust fund or property is a prerequisite to the grant of an injunction or to the interference of the court with the trustee's possession. See 3d Pom. Eq., Sec. 1334; 23 Am. & Eng. Enc. of Law, 1012; 2 Beach on Trusts and Trustees, Sec. 686, 688; Edwards on Receivers, Sec. 77; Manhattan v. Walker, 130 U. S. 467; Ford v. Taylor, 137 Fed. 150.)

And it must be a very strong case, indeed, which would induce the Court to take the property (in the hands of agents of the State) out of their hands, and put it into the hands of its own officers.

Vose v. Reed, 1 Woods, 644.

Even though all trusts are within the special jurisdiction of courts of equity, that jurisdiction will not be exercised, when there is a full and adequate remedy at law.

Thus, in the case of Day v. Washburn, 24 Howard, 352, the jurisdiction was sustained, because there was a fund which a court of equity *only* could reach.

In the case of Case v. Beauregard, 101 U. S. 691, jurisdiction was sustained because, as the Court said:

> "But when the bill asserts a **lien** or a **trust**, and shows that it may be made available **only** by the aid of a chancellor, it obviosuly makes a case for his interference."

In the case of Clews v. Jamison, 182 U. S. 461, the Court said:

> "The jurisdiction of the Court below was plainly established, **because**, under the circumstances, the complainant had no adequate and full remedy at law."

In the case of Weyman v. Wallace, 101 U. S. 230-240, the only question involved was whether the beneficiaries could go into equity without exhausting legal processes or remedies.

The only distinction on principle and authority between the beneficiary of a trust and an ordinary creditor is that one can, and the other can not, go into equity without exhausting all legal processes or remedies; but it is equally elemental that neither one nor the other can

go into equity, if the remedy at law is complete and adequate

All of the material allegations in the bills filed in the Circuit Court were sworn off by the answers, nor was there any evidence submitted in support of the bills to overcome this; therefore, upon the case made, the Court was not justified in granting an injunction or appointing receivers pendente lite. See:

2d Daniels Chancery Practice, 6th Edition, page 1667; 1st Bates Fed. Equity Procedure, Secs. 531, 587; 2d Hill on Injunction, 4th Ed., pp. 1540, 1542, 1543; 17 A. & E. En. Pl. & Pr., p. 738; 10 Ibid. 929; Rider v. Bateman, 93 Fed. 1625.

The Circuit Court of Appeals, in dealing with the question which we are now discussing, finds that the bill and the testimony in support of it are sufficient to authorize a decree for injunction and receivers, because:

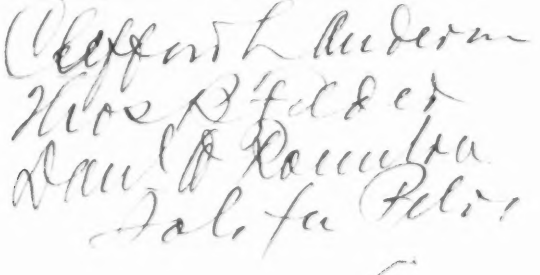
> "The bill alleges a just debt still existing and unpaid for liquors sold to the Dispensary authorities by the complainant. It is further alleged that said debt has been audited by the agency employed by the appellants and has been found to correspond with the entries upon the books kept by the State Dispensary Board, and further, that the appellants refuse to pay complainant's debt from the funds in their hands, set apart for that purpose. If these allegations are true, the complainant has the right to invoke the aid of the Court. The appellants, in their return to the order to show cause, in paragraph 11, substantially deny the validity of the complainant's debt in the following language: 'The Commission is advised by the Attorney-General and his associates that the claim of the plaintiff for goods sold by it to the State Dispensary is unjust and invalid, which they have evidence to establish.' This is a practical admission that

> the appellants did not intend to pay complainant's debt from the fund in their hands. His only recourse, therefore, was by an appeal to a Court of competent jurisdiction to determine as to whether or not his debt was just, and if so, to require the appellants to pay it from the fund in their hands for that purpose declared, and also to have the fund preserved to that end."

But from what standpoint did these facts, if true, justify a court of equity in granting an injunction against the Commission, or appointing receivers to take the funds out of their hands. These statements by the learned Court may go to establish that the creditor had a right to invoke the aid of the Court to establish the question as to whether his debt was just or not, but he did not need a court of equity to establish this point; an ordinary suit at law was sufficient. The bill and the testimony in support of it did not justify the conclusion that an injunction was necessary in order to preserve the fund. On the contrary, the case, as made, disproved any idea of wastfulness, misappropriation, or improper disposition, or the removal from the jurisdiction of the court of the fund in question. And as to the order appointing receivers for said fund, there does not seem to be the remotest excuse for this action of the Court. There is no charge, or suggestion, that the trustees are either incompetent, incapable, or improper persons to execute the trust. The bill is predicated upon the idea that there is a trust, and the creditor has the right to invoke the aid of a court of equity to enforce it, and yet the Court proposes to take away from the alleged trustees the possession of the fund, deprive them of all power to carry out the provisions of the Act alleged to have created a trust, and through its own officers to attempt to execute the trust, rather than to enforce it; and that the Court was

impressed with the character and capacity of the Commissioners to perform the trust alleged to have been imposed upon them under the Act, is borne out by the fact that it appoints them as its own receivers, and speaks of them in its opinion in the highest terms.

The Act of the Legislature providing for the appointment of this Commission evidently relied upon their patriotism in a large measure for proper service to the State, and provided that their compensation should be merely nominal; yet men of such excellent character and business standing as these gentlemen, selected by the Judge himself as proper persons to be receivers of his Court, with this insignificant emolument attached to the office, accepted the positions and undertook to carry out the provisions of the Act. What need, then, for the additional expense of receivers whose compensation must be paid from the funds seized by the Court? What need then for the grant of any equitable remedies increasing the expenses of the administration of this fund, to the detriment of the State of South Carolina only, when the creditor has an adequate remedy at law, the expense of which he must bear himself in establishing by an ordinary suit that his claim is a just liability, and subject to be paid under the provisions of said Act?



FILED.
FEB 17 1909
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1908

No. 625

W. J. MURRAY, JOHN McSWEEN AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, et al., *Petitioners,*

vs.

WILSON DISTILLING COMPANY et al., and THE FLEISCHMANN COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals of the Fourth Circuit.

BRIEF OF J. FRASER LYON AND B. L. ABNEY, COUNSEL FOR PETITIONERS.

THE STATE CO., LAW PRINTERS, COLUMBIA, S. C.

Supreme Court of the United States

OCTOBER TERM, 1908

No. 625

W. J. MURRAY, JOHN McSWEEN AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, et al., *Petitioners,*

vs.

WILSON DISTILLING COMPANY et al., and THE FLEISCHMANN COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals of the Fourth Circuit.

BRIEF OF J. FRASER LYON AND B. L. ABNEY, COUNSEL FOR PETITIONERS.

STATEMENT OF THE CASE.

The State Dispensary Commission, created by and under an Act of the General Assembly of the State of South Carolina, approved February 16, 1907, was, at the time the bills of complaint in these two suits were filed, engaged in the investigation and hearing of claims against the State Dispensary, and among

them the claims of the complainants. (Record, 45, 186, 57-63.)

This Commission, by the terms of the Act creating it, was expressly given the power and authority to investigate the past conduct of the affairs of the Dispensary, and had conferred upon it all the power and authority which had been given and conferred upon a legislative committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved on the 24th of January, 1906. See Act, Section 8, set out in the Bill of Complaint. (Record, 20.)

Under Section 3 of the Act of the 24th of January, 1906, the power to send for and to require the production of any and all books, papers or other documents in writing which may be deemed relevant to any investigation, and to require the person or persons in custody or possession of such papers to produce the same before the Commission, was expressly granted: and by Section 5 the right to withhold the payment of any claim against the State Dispensary until the same should be duly approved by the production of the books of original entry, and all documents and correspondence relating to transactions with the State Dispensary, and to have the person or persons in custody or possession of the said books, documents, papers, and correspondence to produce the same, was also granted.

The Commission had made up a roster of the cases and set same down for hearing. It had also issued an order requiring each and every claimant to produce the books containing the transactions relative to its claims, and that the person making such transaction should appear for examination before the Commission. (Record, 45, 186, 57-63.)

This order and notice the complainants refused and declared that they would not comply with, and filed these bills of complaint.

The Bill of Complaint brought by the Wilson Distilling Company was filed in the office of the Clerk of the Circuit Court of the United States for the District of South Carolina on the 31st day of December, 1907, and a restraining order and rule to show cause why the defendants should not be restrained until the final hearing therein was issued by the Hon. J. C. Pritchard, United States Circuit Judge, at Asheville, N. C., on the 30th day of December, 1907. A receiver was not asked for in the prayer of

this bill, (Record, 2). A return and answer to the rule was filed on the 4th day of February, 1908, (Record, 11).

In the meantime the Bill of Complaint, brought by the Fleischmann Company in the Circuit Court of the United States for the District of South Carolina, was filed in the office of the Clerk of the said Court, on January 23, 1908, (Record, p. 17), and a rule to show cause why the relief prayed for in the bill should not be granted and why a receiver should not be appointed by the Court to take charge of and administer the funds in the hands of the defendants arising from the sale of property belonging to the State Dispensary, etc., was issued by the Hon. J. C. Pritchard, Circuit Judge, at Asheville, N. C., on the 21st day of January, 1908, (Record, p. 29), and was made returnable on the 29th day of January, 1908, at the same place. A restraining order was issued by the same judge on the 22d day of January, 1908, (Record, 33). A return by the State Dispensary Commission and the individuals composing it, to the rule to show cause, was made and filed on January 29, 1908, (Record, p. 41). On the 29th of February, 1908, an order was passed continuing the injunction granted in the Fleischmann Company case (Record, p. 86), and on the 5th of March, 1908, Judge Pritchard filed his opinion (Record, pp. 88-99), wherein he held that the Court had jurisdiction in the case, and that the injunction theretofore issued by him should be continued to a final hearing.

On the 29th day of January, 1908, an order was passed in the Wilson Distilling Company case allowing the Anheuser Busch Brewing Company, a corporation of Missouri, and Gallagher & Burton, a firm composed of citizens and residents of the State of Pennsylvania, to be made parties complainant (Record, p. 16).

An order granting leave to file an amended and supplemental bill was also passed, (Record, 104), which said amended and supplemental bill was filed on the 24th day of February, 1908, (Record, 105), and on the same day a rule was issued requiring the defendants to show cause before the Circuit Judge at his chambers in Asheville, N. C., on the 29th day of February, 1908, why the relief prayed for in the bill should not be granted, and why a receiver should not be appointed and an injunction issued as therein prayed for, (Record, 122).

On the said day, the 29th of February, 1908, the hearing upon the rule issued in the Wilson Distilling Company case was continued until the 7th day of March, 1908, (Record, 143), and a further order making new parties defendant was passed on the 3d of March, 1908, (Record, 144). On the 7th day of March, 1908, in accordance with the requirements of the rule, the defendants, Murray and others, composing the State Dispensary Commission, made their return, (Record, 177). It seems, however, that on the day preceding the day fixed for the hearing on the rule to show cause why a receiver should not be appointed, the Circuit Judge, at his chambers in Asheville, N. C., passed an order appointing temporary receivers, (Record, 189).

After hearing the returns made to the several rules issued by him, Hon. J. C. Pritchard, Circuit Judge, at his chambers at Asheville, N. C., on March 7, 1908, passed and filed his order consolidating the two causes, and appointed Joseph A. McCullough, C. K. Henderson and B. F. Arthur receivers, and also continued in full force and effect until the final determination of the said causes, or until the further order of the Court, the restraining orders theretofore issued by him, (Record, 190). Prior, however, to this order, a petition for mandamus had been filed in the Supreme Court of the State of South Carolina, entitled "*The State of South Carolina, ex rel. J. Fraser Lyon, as Attorney-General, Petitioner, vs. W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, as State Dispensary Commission, Respondents*"; and a rule to show cause was issued by the Chief Justice of the said Court returnable in the Court on the 4th day of March, 1908, (Record, pp. 232-234). A return was duly made thereto on the said day and a hearing had. Thereafter the Court rendered and filed its opinion, holding that the return of the Commission that it was restrained and enjoined by the order of the United States Circuit Court in the cases there pending from paying out the money in its possession arising from the proceeds of the State Dispensary property, was insufficient, in that the said Court was without jurisdiction to grant such order. It therefore held that the petitioner was entitled to the writ of mandamus from the Court, as prayed for, (Record, 280).

Thereafter the defendants, the State Dispensary Commission, gave notice of a motion to be made before the Hon. J. C. Pritch-

ard, United States Circuit Judge, at Asheville, N. C., on March 27, 1908, to revoke the injunction and receivership orders and dismiss the bills, on the grounds that the Court had no jurisdiction, (Record, 230). Upon hearing the motion on the said day, March 27, 1908, Judge Pritchard refused to vacate his orders and dismissed the motion (Record, 298-301).

The complainants further amended their bills on the 27th of March, 1908, (Record, 302).

Thereafter a petition for allowance of appeal by the State Dispensary Commission of South Carolina, W. J. Murray, John McSween and Avery Patton, constituting said Commission and as individuals, and such other of the defendants as signified their assent to join in the appeal (the defendants, C. K. Henderson and B. F. Arthur, having resigned as Commissioners before this date and their offices as Commissioners being then and now vacant), was duly filed, along with an assignment of errors, which said appeal was allowed and citation issued. The assignment of errors is found in the Record, page 314, *et seq.*

It will not be necessary to refer to the original Bill of Complaint of the Wilson Distilling Company. The amended and supplemental bill makes such material changes that reference to the former bill may be entirely omitted. As the bill of the Fleischmann Company was filed prior to the amended and supplemental bill of the Wilson Distilling Company, we will first state the issues raised by it (Record, 17).

The complainant alleges that it is a corporation of the State of Ohio, and that the defendants are citizens and residents of the State of South Carolina, thus giving the necessary diversity of citizenship to maintain the suit. It then proceeds to allege that prior to the passage of the Act of 1907, hereafter alluded to, it had sold certain whiskies and liquors to the State Dispensary of South Carolina, and that the said Dispensary thereupon became, and was at the time of the passage of the Act of 1907, and still is, justly indebted to it for a balance of $66,501.19, which the State Dispensary Commission had, after certain deductions, agreed to pay and admitted to be due. It further alleges that prior to the passage of the Act of 1907, the State of South Carolina had established an institution for the purposes of buying, selling, and distributing alcoholic liquors within the State, which institution

was known as the State Dispensary, and that its agents and officers were directed and empowered to purchase, in its name and in its behalf, all kinds of spirituous, etc., liquors, and to pledge the credit of the State Dispensary for the payment for the same.

It then alleges that by an Act entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs," approved the 16th of February, 1907, the State Dispensary Commission was created. This Act is set out in full in the Bill. That within a short time thereafter the commission provided for was appointed and the defendants qualified and organized, pursuant to the Act, as the State Dispensary Commission.

That upon their qualification and organization the defendants entered upon the discharge of their duties; took possession and control of the entire business and property of the State Dispensary; sold the property and collected the debts due to the State Dispensary, and the proceeds arising from the sales and collections are in the hands of the defendants, applicable to the payment of the liabilities of the State Dispensary, and to the other uses and purposes designated in the Act. It alleges certain negotiations referred to, which it is not necessary to set out, between the State Dispensary Commission and itself, whereby the amount of its claim was admitted to be true and owing. It alleges that the Commission had collected and received from the sale of the property of the State Dispensary, and had in hand upwards of $800,000; that the debts due by the State Dispensary did not exceed the sum of $600,000, and charges that the fund so in the hands of the State Dispensary Commission is held for the specific purpose of paying all the just liabilities of the State Dispensary, and constitutes a trust fund in the hands of the defendants for it and the other creditors of the State Dispensary, and that the amount due to it had been agreed upon, and that it is entitled to have the said amount immediately paid to it out of the said fund. The bill then proceeds to allege that the defendants (the State Dispensary Commission) are abusing the trust reposed in them by wrongfully and unlawfully failing to carry out the terms of the Act of 1907, and that the greater part of the money which they had received has been on deposit for many months, and was then on deposit, with certain banks of the State of South Carolina, in which banks the

defendants, or some of them, are interested as officers or stockholders, and that the defendants have wrongfully, unlawfully and fraudulently refused and declined to make distribution of the money among the creditors of the State Dispensary, or to pay the claims of the complainant or any of the other creditors, for the reason that there had been formed, and then existed, an unlawful understanding and agreement between the defendants by which it had been decided that the money deposited in the banks above mentioned be allowed to remain as long as possible in the said banks to use for their benefit and profit. It further alleged that there were a large number of persons claiming to be creditors of the State Dispensary and seeking to collect from the defendants the various sums due them, and that suits had already been brought against the defendants, and others were threatening to institute similar action, and alleged that if the defendants should be required or permitted to defend the multiplicity of suits in order to determine the validity of each claim against them, and should be allowed, as they have declared their intention to do, to defer payment of all claims until a final determination of the said suits, a large part of the fund in their hands would be wasted in expensive litigation and court costs, and great wrong, injury and injustice would be done to the complainant and other creditors whose claims are admitted to be just, and about which there is and can be no dispute.

It then alleged that although the said Commission had a large sum of money in their hands, and though they were wrongfully retaining the same for the use and benefit of the banks above mentioned, yet they had only given bond in the sum of ten thousand dollars each, and were at the time threatening to take measures to have an Act passed by the General Assembly of the State of South Carolina terminating their commission and providing for a transfer of the money from their hands to the State Treasurer, which money ought to be applied to the payment of the debts due the complainant and other creditors of the State Dispensary, and thus placing the same beyond the reach of, or by some other means impairing the contract rights of, the complainant and the said other creditors, and that unless they are restrained and enjoined from exercising any control over or in any way interfering further with said fund, the defendants would waste or

wrongfully divert the same to the great and irreparable injury of the complainant and all other creditors of the State Dispensary.

It then alleged a dissension in the Commission on the part of the defendant Arthur, and that he had declined and refused to take any further part in the proceedings therein, and that on account of the dissension the complainant believed that it was impossible for the Commission to agree upon any plan for carrying out the provisions of the Act of 1907, or to execute the trust imposed upon them by the said Act, and that unless the Court should take charge of the trust fund now in the hands of the defendants, as members of the said Commission, and administer the same in accordance with the provisions of the said Act of 1907, the complainant and other creditors of the State Dispensary would, to their great and irreparable damage, be indefinitely delayed in the collection of their claims.

The bill further charged that the defendants alleged and pretended that there were certain irregularities and fraud in connection with some of the sales of liquors made to the former officers of the State Dispensary, and that the defendants had entered into an unlawful combination or conspiracy with the Attorney-General of the State of South Carolina, under whose advice the defendants were acting, to aid the said Attorney-General in carrying out his frequent threats to prosecute and imprison the said officers, and to that end had agreed among themselves and with the said Attorney-General to withhold payment of the claim of the complainant and other creditors until the Attorney-General had obtained such evidence as might be sufficient to prove the guilt and secure the conviction of the said officers, and that under and pursuant to this agreement, combination or conspiracy, the defendants had refused and were still refusing to carry out the provisions of the said Act of 1907 and to pay the claim of the complainant and other creditors of the State Dispensary, although the account of the complainant had been duly audited, the amount of the claim admitted to be justly due and payable, and notwithstanding the defendants had never made any pretense or claim that any of the sales made by the complainant was in any sense irregular, illegal or fraudulent, and notwithstanding the frequent promises and agreements of the defendants to pay the amount so admitted to be due.

It further alleged that the defendants had never claimed or pretended that the amount due the complainant was subject to any offset, credits or counter-claims, and that the complainant was ready, able and willing, if the Court should direct that the amount due it should be immediately paid, to execute and deliver to the defendants a good and sufficient bond conditioned to pay the defendants all such amounts as might be, upon a hearing of the case, found and adjudged to be due by the complainant to the defendants by way of offset, reduction, credit, counter-claim or otherwise.

The prayer of the bill was that the Court would forthwith appoint a receiver to take charge of and administer as a trust fund all of the money in the hands of the defendants arising out of the sale of the property belonging to the State Dispensary of South Carolina, or from the collection of debts due to it; or direct and decree that the amount admitted to be due the complainant be immediately paid to it upon the execution by it of a good and sufficient bond, to be approved by the Court, and conditioned to pay the defendants all such sum or sums as should be found to be due them by the complainant and adjudged to be paid by it.

That the defendants, their agents, servants, attorneys and employees should be restrained and enjoined from disposing of or paying out, or in any manner interfering further with the fund or any part thereof; and that it be referred to a master to ascertain and determine the amount due the complainant for goods sold and delivered by it to the State Dispensary, and that a decree be entered ordering and directing that the amount so found to be due be immediately paid to the complainant, and that the defendants be required to set forth an account, etc. (Record, 17-27).

The amended and supplemental bill of complaint of the Wilson Distilling Company, (Record, 105-119), in substance is very much like the bill of the Fleischmann Company. It sets out in full the Act of 1907, the organization of the Commission and their entry upon the duties of their office, the sale of the State Dispensary property, except the real estate (which was not included in the Act, and was a very large and important asset of the State, bought with funds arising from the business and held by it as a part of

the State Dispensary); the collection of the debts due the State Dispensary; the deposit of the funds in certain banks of the State, national and State; and that the amount which it had received from such sales and collections, together with the sum received from the State Treasury, amounted to about $800,000, and that such sum of money was applicable to the payment of the just liabilities of the State Dispensary and to other purposes designated in the Act.

It then set out that the complainants had, prior to the passage of the Act of 1907, sold, at prices which were reasonable and mutually satisfactory, large quantities of alcoholic liquors, and that the State was due to them the specific amounts set out in the several paragraphs of the bill. All of them, however, being mere debts upon a simple contract of purchase and sale. It alleged that the money received by the defendants and held by them was placed in their possession for the specific purpose of paying the just liabilities of the State Dispensary, and became, and now constitute, a trust fund in the hands of the defendants, and that defendants held the same as trustees for the complainants and the other creditors of the State Dispensary, and that they became and were charged with the ministerial duty of paying all of the said just liabilities of the State Dispensary to the complainants and other firms, corporations and associations respectively entitled thereto; that the said sum of money, if properly preserved and applied, would be amply sufficient to pay off the claims of the complainants and all other just liabilities of the State Dispensary, which said liabilities did not exceed the sum of $609,000.

The bill then proceeds to charge that the defendants constituting the State Dispensary Commission had abused, and were abusing, the trust reposed in them, to-wit:

(a) By wrongfully and unlawfully failing and refusing to pay the just claims of the complainants and other persons, firms and corporations having just claims against the State Dispensary at the earliest practicable moment, as required by the Act of 1907.

(b) By unlawfully, and for the wrongful purpose of avoiding, delaying and defeating the payment of the just liabilities of the said State Dispensary, denying their trust and that they owed any duty to the creditors of the State Dispensary.

(c) By wrongfully and unlawfully exceeding the powers conferred upon them by law, and by usurping and presuming to exercise the powers of a Court, and unlawfully attempting to arrogate to themselves exclusive jurisdiction of all claims against the said State Dispensary and against the funds in their hands.

(d) That they had exercised their powers and functions in a partial, unfair and oppressive manner, and the hearings and proceedings had by them upon the claims of persons, firms and corporations who allege themselves to be creditors of the State Dispensary had not been designed to ascertain the just liabilities of the said State Dispensary, but were for the purpose of providing some more or less plausible excuse for refusing to pay the liabilities of said State Dispensary and for the procurement of evidence to be used by the Attorney-General of the State in his proposed criminal prosecution of Dispensary "grafters," and in furtherance of this latter design they had wrongfully required the attendance of non-resident persons as witnesses upon claims against said fund with the sole or principal object of enabling the Attorney-General to have criminal process executed against the said persons while within the jurisdiction of the State in obedience to said requirement, and at the same time had wrongfully refused to pass upon or allow such claims without the personal presence of such non-resident persons at their hearings.

(e) That they are wrongfully seeking, or that they wrongfully acquiesce in other persons seeking for them, an amendment to the Act of 1907, having for its purpose the legalizing of their usurpations of the powers and functions of a Court, and their wrongful claim of exclusive original jurisdiction, as such Court, of all claims against said Dispensary and against the funds in their hands.

(f) That they wrongfully seek, through the proposed legislation, to place the said funds beyond the reach of this Court, and every other regularly organized Court of general jurisdiction, and thereby render it impossible for the complainants and other persons having just claims against the State Dispensary and against the said funds to realize anything upon their claims, through any legal proceedings, or otherwise, except such amounts as the defendants may be pleased to allow them.

(g) That they deny the right of the complainants and other persons having just claims against the said Dispensary and against the fund to have their claims litigated in a Court of general jurisdiction, and are attempting, through the proposed legislation, to make such denial effectual.

The bill further charges that the defendants, by their conduct and usurpations, and through the proposed legislation, seek to deny to the complainants and other persons having just claims against the Dispensary, the right of trial by jury guaranteed by the Constitution of the State of South Carolina; and that they seek to deprive them and all other persons holding just claims against the State Dispensary and against the fund, of their property without due process of law, and to deny to them the equal protection of the laws, in violation of their rights under the Constitution of the United States.

The bill further alleged that suits were threatened against the defendants by persons claiming to be creditors of the State Dispensary, and that if defendants were permitted to defend a multiplicity of such suits in order to determine the validity of each claim against them, and were allowed to defer payment of all claims until the final determination of such suits, a large part of the fund in their hands would be wasted in expensive litigation and Court costs, to the great injury and damage of complainants and all others having just claims against the Dispensary.

The prayer of the bill is that a receiver be forthwith appointed to take charge of and administer as a trust fund all the money in the hands of the defendants arising out of the sale of the property belonging to the State Dispensary and from the collection of the debts due it; for an injunction against the defendants restraining them from disposing of or paying out, or in any manner interfering further with the fund or any part thereof, except to transfer it to the receiver appointed by the Court, and that it be referred to a Master to ascertain and determine the amounts due to the complainants and other creditors upon their claims against the State Dispensary and against the said fund in the hands of the defendants, and that a decree be entered ordering and directing the amounts so found to be due to be immediately paid to the complainants respectively, etc. (Record, pp. 105-119).

It will thus be seen that in both bills the complainants seek to have the Court to inquire, ascertain and determine the amounts which may be due by the State of South Carolina on the said purchases and sales of liquors to the complainants, and to adjudge and decree the same against the State as a just liability.

The return and answer of the State Dispensary Commission to the original Bill of Complaint brought by the Distilling Company was filed, but it need not be further referred to, as the State Dispensary Commission, upon the rule to show cause, which was issued under the amended and supplemental bill, reiterates what is contained therein and answers in full such amended and supplemental bill.

The return to the rule to show cause and to the Bill of Complaint in the Fleischmann case, (Record, 41), of Murray, McSween, Arthur, Henderson and Patton, constituting the State Dispensary Commission of South Carolina, and as individuals, without submitting themselves to the jurisdiction of the Court, but objecting thereto, averred that the complainant had not by and in its Bill stated a cause which entitled it to any such relief as was sought or prayed for against the defendants or any of them. They next averred that the suit so instituted was in fact and in legal effect a suit against the State of South Carolina and not against them or any of them, except as in their official capacity they represent the State, and, therefore, the Court had no jurisdiction by reason of the provisions of the Eleventh Amendment to the Constitution of the United States. Further, that the purpose and intention of the suit was to administer the funds belonging to the State and in the custody of its agents, to coerce it into the payment of the alleged debt of the complainant, and to restrain a duly constituted Court of the State in violation of Section 720, Revised Statutes.

The return then proceeded to answer in full and in detail all of the allegations contained in the Bill of Complaint. It is impossible to summarize in a brief space this return and the statements made therein concerning the organization of the State Dispensary Commission, the proceedings before it and the complainants' relations to the State Dispensary. We can only refer to the Record for this statement (Record, pp. 41-51).

The defendants, Murray, McSween, Arthur, Henderson and Patton, on March 7, 1908, made return to the rule to show cause issued upon the amended and supplemental Bill of Complaint of the *Wilson Distilling Company vs. W. J. Murray et al.*, why the relief prayed for in the bill should not be granted, and why a receiver should not be appointed and an injunction issued as prayed for, reserving objection to, and not submitting themselves to, the jurisdiction of the Court, but insisting that it was without jurisdiction in the premises, etc., (Record, 177). They objected:

(1) That the complainants in and by their bill had not stated a cause which entitled them to the relief prayed for;

(2) That the suit is, on the face of the bill, in effect, a suit against the State of South Carolina, seeking as it does to coerce the said State, through its officers, in the payment of alleged claims against it; to substitute this Court in place of its officers in the exercise of the authority, discretion and jurisdiction conferred upon them by a statute of the State, and to usurp the functions of the Commission; to take the funds of the said State out of the hands of its officers and place them in the hands of a receiver of the Court; and to enjoin and restrain the defendants, as officers of the State, from paying over or disposing of the funds of the State, as it had directed or may hereafter direct.

(3) That it appears upon the face of the bill and from the allegations therein contained, that the State was an indispensable party to the suit, but had not been made a party on the record, and can not be made a party without its consent, which consent had never been given.

The Commission further made return denying in substance every allegation of the bill which showed or tended to show any irregularity, improper conduct in the administration of their trust, or any abuse whatsoever of said trust, or of the rights of any person claiming to hold or to have a just liability against the State for or on account of whiskies and liquors sold to it in the conduct of the business of the said State.

The respondents, further answering, alleged that the State Dispensary, as it had existed prior to the Act creating the said Commission, had no existence or entity or credit separate and apart from the State, of which it was a mere agency for the conduct and operation of the particular business, and that all purchases

were made by the State and upon her credit. It admitted the purchases from complainants alleged in the complaint, but averred that such attempted sales were not made in accordance with the law and were in violation of the Statutes of the State of South Carolina and in pursuance of a conspiracy between complainants and officers of the State to cheat and defraud the State in the manner set forth in the return, and denied that the funds held by them were held as trust funds or were applicable to the payment of the alleged claims of the complainants except so far as said claims, upon investigation by said Commission, may be adjudged by said Commission to be just and valid claims against the State, in whole or in part. These returns were accompanied by affidavits and other papers in support thereof.

The return further set out that the General Assembly of the State of South Carolina had, on the 24th day of February, 1908, amended the Act creating the Commission, which said Act is hereafter referred to, and whereby it was declared that the said Commission possessed full power to pass upon, fix and determine all claims against the State growing out of dealings with the State Dispensary, and prohibiting any funds held by said Commission from being paid out for any purpose or to any person whatsoever except upon the check of the chairman of said Commission countersigned by the Treasurer of the State of South Carolina, and that the Treasurer of the State of South Carolina should countersign only such checks as may be presented by the chairman of said Commission upon presentation of the same, with the certificate of said Commission showing that it is for the payment of a claim of a creditor which has been adjudged by said Commission to be due, and upon such adjudication ordered to be paid, etc.

Upon the hearing upon these rules to show cause why a receiver should not be appointed, the Court consolidated the two causes and passed an order granting the injunction until the final determination of the suit or the further orders of the Court, and appointing receivers and directing them to take charge of and administer all and singular the money, funds, property, rights, credits and assets involved in the case, and theretofore enjoined from being disposed of, especially all the money then in the hands of the defendants arising from the sale of the property belonging to or in connection with the sale of the said State Dispensary,

or from the collection of the debts due to it, or the moneys deposited to the credit of the defendants composing the State Dispensary Commission in the various banks and depositaries, and the defendants and each of them were required and commanded to pay over and deliver to the said receivers, on demand made on them, all of said moneys, funds, etc., which the defendants constituting the said State Dispensary Commission now have in their possession or under their control by virtue of the Act of the General Assembly of the State of South Carolina, passed at its session in 1907, creating the said State Dispensary Commission. All and singular the creditors of the South Carolina State Dispensary were restrained and enjoined from prosecuting any suit or proceedings for the collection or enforcement of their claims against the defendants except by leave of the Court first had and obtained. (Record, p. 190.)

Thereafter, on the 26th day of March, 1908, Judge Pritchard allowed the complainants to amend their bill, which said amendment to the bill was made and filed on the 27th day of March, 1908. This amendment, however, only averred that the Act of 1907 created a trust for the specific purpose of paying off all the just liabilities of the State Dispensary; that the defendants constituting the State Dispensary Commission duly accepted such trust as trustees, and that the complainants and other creditors of the State dispensary duly accepted the benefits of the said trust as *cestui que trust*, and that by such acceptance a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States, and of Art. I, Sec. 10 thereof, was created; and, further, that the Act of 1908, amending the Act of 1907, was unconstitutional, null and void, as impairing or tending to impair the obligation of the contract hereinabove mentioned, and an attempt to deprive the complainants of their property without due process of law, etc. This amended bill contains averments with regard to the institution of the mandamus proceedings before the Supreme Court of the State of South Carolina, which averments and allegations we conceive are of such indifferent character as not to merit comment.

The State Dispensary Commission petitioned for the allowance of an appeal to the Circuit Court of Appeals from the interlocutory orders denying the temporary restraining order and grant-

ing the injunction *pendente lite* and appointing receivers, which was duly granted, (Record, 311); and filed six assignments of error (Record, 314). These assignments of error were presented and argued before the Court under the following heads:

(1) Because upon the face of the bills the Court had no jurisdiction or authority to pass any orders therein;

(2) Because the suits were in effect suits against the State of South Carolina, and as such State had not consented to be sued, the Court was without jurisdiction;

(3) Because the State of South Carolina, as appears on the face of the bills and the proceedings had, is an indispensable party, but as the State has not consented to be sued it can not be made a party to the suits. The Court is therefore without jurisdiction.

The appeal was heard in the Circuit Court of Appeals for the Fourth Circuit on May 26, 1908, (May term, 1908), (Record, 330). Afterwards, on September 15, 1908, the Court announced and filed its opinion affirming the decree of the Circuit Court for the District of South Carolina, and remanding the case to be further proceeded with, in accordance with the views expressed in the opinion (Record, 331).

A petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit was filed and presented in this Court, and the same was granted on the 8th of December, 1908, and the record was certified by the Circuit Court of Appeals to this Court on the 22d day of December, 1908, (Record, 378).

SPECIFICATIONS OF ERRORS IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The petition for a writ of certiorari submitted that the Opinion of the Circuit Court of Appeals affirming the order of the Circuit Court granting injunction and appointing receivers was erroneous:

1. In holding that the suits were not suits against the State in violation of the provisions of the Eleventh Amendment to the Constitution.

2. In holding that the State was not a necessary and an indispensable party to said suits.

3. In holding that the Circuit Court had jurisdiction of said causes.

4. In holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

5. In not holding that there was no equity in said bills, and no cause or necessity shown for the grant of an injunction or the appointment of receivers.

6. In not reversing the order and decree granting an injunction and appointing receivers.

7. In not directing a dismissal of the bills and each of them.

We propose, however, to treat these assignments of error as presenting only three questions:

(1) Whether the suits are suits against the State;

(2) Whether the Act of 1907 created a trust and divested the State of all control or disposal of the State Dispensary property;

(3) Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund.

BRIEF OF ARGUMENT.

(1) *Whether the suits are suits against the State.*

The Circuit Court of Appeals reached its conclusion that these suits were not suits against the State by the following course of reasoning:

"The State, through its Legislature, has passed both the title and possession of the fund involved to the Commission for the purposes designated in the Act, the first of which is to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations. The fund being in the hands of the Commission charged with this duty, the State has no interest in so much thereof as is necessary to pay the just debts; then, how can it infringe any right of the State to have the true amount of the debts due by the defunct Dispensary judicially ascertained? . . ." (Record, 361.)

"We are constrained to hold that the fund in their hands is, by virtue of the provisions of the Act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dis-

pensary have a property in the fund in the hands of the Commission, to the extent that the debts are shown to be just, and that a judicial termination of the true amount of such debts can, in no way, affect the rights or interests of the State, the only interest of the State in the fund being, as declared by the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities. It is elementary that particular formality is not required in the creation of a trust. Any agreement or contract in writing, executed by one having the power to dispose of property, whereby it is directed that particular property or fund shall be held or dealt with for a special purpose for the benefit of another, in such case equity raises a trust in favor of the beneficiary. The right to create a trust for specific purposes is not confined to individuals or private parties, but we find in Perry on Trusts, Sec. 30, 'that a State, by its legislation, or by its public officers, duly authorized, can create a trust, convey property and appoint trustees.' The provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors. There are the necessary three parties, the trustor, the trustees, and the *cestui que trusts*. The State, acting through the legislature, passes the title and possession of certain property to the five appellants who are constituted a Dispensary Commission. The direction is that the appellants take this property, sell it, collect debts and, when the proceeds are in hand, pay off the just liabilities of the State Dispensary. The Act then provides for the payment of certain expenses incident to the discharge of the duties devolving upon the Commission, and after that, the residue to be paid to the State. We undertake to say that there is scarcely to be found recorded anywhere an assignment by a debtor for the benefit of creditors more intelligently constructed or more readily understood. Having, therefore, determined the relation of the appellants to the fund in controversy, we answer the question propounded in the outset that THIS IS NOT A SUIT AGAINST THE STATE and THAT COMPLAINANT IS NOT FORBIDDEN TO MAINTAIN HIS ACTION BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The appellants are in possession of the fund which complainant is seeking to recover on the ground that

it has been set apart and placed in the hands of the appellants to pay a debt which is justly due him. The State of South Carolina does not intervene to assert any right to this fund or to have any interest which the State may have in it determined, but the appellants themselves raise the question of the jurisdiction of the Court, basing it upon the allegation that the property in their hands belongs to the State. We think, in view of the facts in this case, upon the authorities heretofore cited, and especially under the case of *Tyndal vs. Wesley, supra*, the appellants are not entitled to avail themselves of that defense." (Record, 366-368).

Upon this question we do not consider it necessary to go further back than the provisions of the Constitution of South Carolina of 1895, and the Acts made in pursuance thereof. The Constitution of 1895 created and authorized the operation of a State Dispensary as a part of its governmental machinery. The clauses of the Constitution referring to this are Article 8, Section 11, and Article 11, Section 12, (see Act in Appendix). The Constitution of 1895 went into effect from and after the 31st day of December, 1895. In pursuance of such Constitution, the first Act of the Legislature was an Act, approved March 6, 1896, (22 Stats., 123). All other Acts relating to or amending this Act were made subject to and derive their authority from the sections of the Constitutions above named. With some changes from time to time, this law continued until February 16, 1907, when, by Section 47 of the Act, approved on that date, and which went into effect thereupon, the State Dispensary was abolished, and the regulation and sale of alcoholic liquors and beverages within the State was devolved upon the several counties through County Dispensary Boards (25 Stats., 463).

"Section 47. The State Dispensary is hereby abolished, and all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided*, That this Act shall not have the effect of preventing any violations of the present criminal law relating to the Dispensary being punished as now provided by law for offenses heretofore committed."

The effect of this statute was simply to take the power of purchasing whiskeys and the making of contracts therefor out of the hands of the State Board of Control, which had theretofore been elected by the Legislature, and to devolve the authority,

under Section 11, of Article 8, of the Constitution, upon county officers and not upon State officers. (Section 6 of the Act of 16th February, 1907; 25 Stats., 468). That section is as follows:

"Section 6. The members of the said County Dispensary Board are hereby declared to be county officers, and are hereby authorized and empowered, under the authority and in the name of this State, to buy in any market and retail within the State liquors and beverages, as provided herein: *Provided*, That the State shall not be liable upon any contract for the purchase thereof beyond the actual assets of the Dispensary for which the purchase is made. The members of the County Dispensary Board and all Dispensaries shall be persons of known moral character and not directly or indirectly applicants for appointment."

It is, therefore, too broad an assertion to say that the State of South Carolina has gone out of the whiskey business. It has simply distributed the power of purchasing, and the sale of, whiskey to the counties of the State or to county officers of the State, and not to the State officers, while the purchases are still expressly made in the name of the State and under its authority, thereby expressing, as we submit, the intention of the Legislature never to change the relation between the State and that of the vendors of whiskeys from that of debtor and creditor, the relation which existed at the time the Act creating the Commission was passed. The sale of whiskey in South Carolina is still a departmental branch of its government, as construed by its Courts, and on account of such purchases the State is still the debtor to the vendor, and no action can be brought against the State on account of its immunity, nor against the County Boards because they represent the State.

It is apprehended that the learned Circuit Court of Appeals in its opinion has laid too much stress upon the point that the State Dispensary has been abolished, and that thereby the intention can be derived that it has abandoned its former policy of still keeping up the business through a State agency, and that, in so retiring from the business, it was the intention to declare a trust upon the property it held in connection with the State Dis-

pensary in favor of the parties with whom the State had been dealing, honestly or dishonestly, (Record, 361).

In view, therefore, of the Constitution and Statutes of the State, it is clear that, at the time the State Dispensary was abolished, on the 16th of February, 1907, the relation existing between the State and the alleged vendors of alcoholic liquors was that of debtor and creditor, and that the State Dispensary Board was simply the agent through whom the alleged contracts were made, being, as declared both by the Statutes and by the decisions of the Courts of the State construing such Statutes, officers of the State.

State vs. Farnum, 73 S. C., 165.

The relation of creditor and debtor existing between the vendors and the State on contracts made by State agents under statutory authority, what effect and result has been brought about by the Act of February 16, 1907, providing for the disposition of all the property connected with the State Dispensary, and to wind up its affairs? 25 Stats., 835.

The petitioners contend that the relation of creditor and debtor existing between the vendors and the State was not changed, and that by such Act a Commission was created to investigate, to determine and to declare what was the true indebtedness of the State to such alleged creditors on account of the purchases of alcoholic liquors, and upon such ascertainment to pay the amount so ascertained and determined by them; that, inasmuch as the Legislature had been for two years investigating the alleged fraudulent purchases and sales of whiskey made to and with its officers, the State Dispensary Board, and inasmuch as it had been satisfied that the present Board had been guilty of fraudulent and illegal conduct, and the Governor had, upon its suggestions, removed the Board of Control (*State, ex rel., vs. Ansel, Governor*, 76 S. C., 395; *Ex parte Parker*, 74 S. C., 466), it desired to create and did create by this Act, a Commission to continue the labors and work of former legislative committees, and to discharge the duties of the investigating committee then existing, and clothed such Commission so created with all of the powers held by and conferred upon such committees, with the additional power heretofore mentioned of determining, ascertaining and paying

the debts found to be true and just liabilities. It did not propose to relinquish control over the question of these claims, and expressly required reports to be made to the Governor, who, it is apprehended, had the power to direct and to require its law officers, in the name of the State, to sue for the moneys illegally obtained by the parties dealing with the Dispensary Board. Hence the investigation which the Commission was to carry on was not confined to purchases made for which claims were to be presented, but it was to proceed with the work of investigating into prior purchases and into the alleged fraudulent conduct of State officers.

This is plainly seen when reference is made to the sixth section of the Act, wherein the State Dispensary Board was abolished, and in which it is declared that such prior offenses could still be prosecuted and the offenders punished, and the laws requiring the prosecution of offenses against the Dispensary law by the Attorney-General of the State.

From all which it is submitted that the Legislature, by such Act, did not intend to make an absolute assignment of this particular property for the benefit, either specially or generally, of the alleged creditors, who should be paid simply upon presentation of their claims,, and whose claims should simply coincide with the items and amounts upon the books of the State Dispensary Board, with whom it was charged they had had fraudulent dealings, on account of which they had been removed from their offices by the Governor of the State.

The General Assembly of South Carolina certainly does not take any such view of the Act, and the construction that the Legislature has placed upon the Act is that the Legislature had not surrendered control of or parted with the title to the Dispensary property or the funds or proceeds arising from the sale of such property; for the very next Legislature amended the Act. This amendment not only provided for the payment of the members of the Commission in the performance of their future duties under the Act, but also assumed control and direction of the fund. Act approved 24th of February, 1908, which is printed in the Appendix to this Brief.

The petitioners, the State Dispensary Commission, therefore insist that the view entertained by the Circuit Court of Appeals that this Act (1907) was similar in substance to the usual form

of conveyance of property in trust for the benefit of creditors, and that the State, acting through the Legislature, passed the absolute title and possession of the property to the Dispensary Commission, is erroneous. On the contrary, they believe that the proper view is that the Legislature, in accordance with the power given it under Article 17, Section 2, whereby it is authorized to direct by law "in what manner claims against the State may be established and adjusted," created a tribunal to investigate the *bona fides* and legality of these claims, and to determine the just liability of the State to these alleged creditors, clothing it with adequate and sufficient judicial power to have such investigation and to carry out the duties devolved upon it.

Such commissions and tribunals are not unusual in South Carolina, nor in other States, or even with the Federal government. They may not be Courts in the sense of the Federal Constitution and statutes, nor in the sense of the State Constitution and its statutes. Nor, while it was made an assignment of error, was it insisted upon in argument before the Circuit Court of Appeals that it was under the Act of 1907 a court, but that it was such under the amendatory Act of 1908.

The Commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay the same over out of the fund. The assets are still the assets of the State. Being officers of the State, with the funds of the State in their possession belonging to the State, and these suits being brought by alleged creditors of the State, the State is the real party in interest, and the suit is virtually against the State.

Opinion Supreme Court of South Carolina, Record, 280, *et seq.*;
McHose vs. Dutton, 55 Iowa, 728;
Brown University case, 56 Fed., 55;
Yale College case, 52 Fed., 177;
Lowery vs. Thompson, 25 S. C., 416;
Board, etc., vs. Gantt, 76 Va., 455;
Louisiana vs. Jumel, 107 U. S., 711.

In *Hagood vs. Southern*, 177 U. S., 52, where bills were brought in the Circuit Court of the United States, the Court said:

"The suits are accurately described as bills for the specific performance of the contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with that consent it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contracts by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' "

Further, the Court said:

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be."

We do not consider that it would be useful to undertake to discuss the many cases which have been determined by the Supreme Court of the United States, for it seems to us clear that this case can not be classified with those cases which are brought in a court of equity or by mandamus to require officers to perform

a plain official duty, the position in which the Circuit Court appears to maintain that this case falls. There is no claim made, and none can be made, that the Act of 1907 is unconstitutional, either impairing their original contract right or depriving them of property without due process of law. The State Dispensary Commission are not defending any case of trespass or of wrongs they may have committed towards the persons or property of the complainants under an unconstitutional statute; nor are they affirmatively, through and by means of an unconstitutional statute, injuring the complainants or invading any of their property rights; nor are they attempting to enforce an unconstitutional statute. Consequently, this case does not fall within any class of cases mentioned by the learned Circuit Court of Appeals, nor is it similar to any of the cases cited by the learned Court. These suits fall into that class of cases where the action of the Court will have the effect of depriving the State of funds or property in its possession, which class of cases comes into conflict with the Eleventh Amendment.

Louisiana vs. Jumel, 107 U. S., 711;
Farmers National Bank vs. Jones, 105 Fed., 459;
Christian vs Atlantic, etc., R. Co., 133 U. S., 233;
Brown University vs. R. I. College, 56 Fed., 55;
Lowery vs. Commissioners of Sinking Fund, 25 S. C., 416;
Board of Public Works vs. Gantt, 76 Va., 455.

It is respectfully submitted that the cases referred to by the Circuit Court of Appeals are not analogous, and the judgments rendered in those cases upon the actual facts involved are not applicable to these suits. If, however, it be admitted that the State of South Carolina passed all title and control over the fund in question, then it must be admitted that these suits against the officers are not suits against the State, as contrary to the Eleventh Amendment, and the citations by the Court are unnecessary. But if title, possession and control have not passed from the State, and the Commission is a mere agency of the State, and by virtue of their office holding funds directly belonging to the State, then certainly there is nothing in the cases cited by the learned Court

which tends at all to sustain the conclusion reached by the Court that these suits are not substantially against the State.

In our view, this Court has invariably declared that, if the relief or the remedy sought against officers of the State or persons claiming to act in behalf of the State, will affect the property rights or the funds of the State, or compel it to pay its debts, or require the specific performance of a contract by the State, the State is necessarily and substantially a party to the suit, or that it is a necessary and indispensable party, and that, as it can not be sued in a Federal Court for want of jurisdiction over the State, the suit must be dismissed.

But if the suit is to enjoin the enforcement of an unconstitutional statute, by officers of the State, it will be presumed that the State has not authorized the wrong, and that the defense by such officers that they are acting under a State statute is insufficient, because no one should be permitted to assert a claimed right which violates the Constitution of the United States.

It is, therefore, submitted that the State Dispensary Commission is a mere agency of the State, holding its funds subject to its control and direction, and that suits against such Commission to deprive it of such possession and control and to apply the proceeds to the payment of alleged debts of the State, to be ascertained in a Federal Court, or in any other Court, or before any other tribunal not designated by the State, and contrary to the manner and form prescribed by its own statute, is in substance a suit against the State and is contrary to its immunity against suit, either in the Federal Court or in its own Court.

(2) *Whether the Act of* 1907 *created a trust and divested the State of all control or disposal of the State Dispensary property.*

The Circuit Court of Appeals held that the State, through its Legislature, had passed the title and possession of the fund involved to the Commission for the purposes designated in the Act,

the first of which was to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations, and that the fund being in the hands of the Commission charged with this duty, the State has no interest in so much thereof as is necessary to pay the just debts, and that no right of the State could be infringed to have the true amount of the debts due by the defunct Dispensary judicially ascertained by the Court in these suits, (Record, 361); that the fund in the hands of the Commission is, by virtue of the provisions of the Act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the funds in the hands of the Commission to the extent that the debts are shown to be just, and that a judicial determination of the true amount of such debts can in no way affect the rights and interests of the State, the only interests of the State in the fund being, as declared in the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities, and that the fund in the hands of the Commission must be treated as a trust fund, (Record, 366-367).

The contention, however, of the petitioners is that the Act of 1907 created a Commission to ascertain what were the just liabilities of the State towards certain persons who had been dealing with one of its institutions, and with officers who had been removed by its Chief Executive on the ground of illegal and improper conduct in creating the very claims to be investigated; that under the conditions existing it never was the intention of the Legislature to create any trust in their favor except such as might result after the Commission had made investigation and had determined their just liabilities; that the Legislature had no authority but to make such law in conformity with the Constitution of 1895, Article 17, Section 2, which reads:

"The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted,"

and that such section was also limited by a former section, Article 3, Section 30, of the Constitution, which declares that

"The General Assembly shall never * * * authorize payment or part payment of any claim under any contract not authorized by law. * * *"

The petitioners claim that the Act of 1907 is nothing but an Act which authorizes claimants to sue or to have their claims established against it, and to be paid out of a certain fund. Allowing such claims to be established and sued on could not be construed as admitting the validity of the claim.

Bank vs. State, 60 S. C., 465.

The Statute books of the State contain instances where the Legislature has seen fit, instead of making the investigation through its own committees, to devolve this duty upon certain persons as commissioners or upon regularly appointed tribunals. But no State decision has ever held that by such Act a contract was created between the State and the claimants, which disabled the Legislature from either modifying or repealing such statute.

Campbell vs. Sanders, 43 S. C., 577.

As an instance of the General Assembly prescribing a special mode of establishing and adjusting claims against the State, see Joint Resolution "providing mode of ascertaining the debt of the State, and of liquidating and settling the same." 16 Stats., 669. By this Joint Resolution a special Court was established with a right of appeal to the Supreme Court of the State, and also of right of appeal by writ of error to the Supreme Court of the United States. One of the provisions of this Joint Resolution required that "all persons holding bonds or coupons of bonds, certificates of stock, or interest orders thereon, issued by this State since the 1st of January, 1866, before they could be entitled to the benefits of the Act, should present the same for examination before the person or persons appointed to examine the debts, liabilities and unfunded debt of the State, etc."

See, also, the establishment of a Court of Claims by an Act "To provide for the settlement of the unfunded debt of the State incurred before the 1st of November, 1876" (16 Stats., 555). This

Court of Claims was to be held by a Commissioner "for ascertaining all legal and just claims," and by an amendment to this Act the burden of proof was declared to be upon the claimant to establish the *bona fides* of the original consideration upon which the claim was based (16 Stats., 788).

As a further instance, see the Joint Resolution to raise a Commission to investigate the indebtedness of the State (16 Stats., 318). This Act is not dissimilar to that approved on the 24th of January, 1906, and entitled "An Act providing for the investigation of the Dispensary." The several Commissions and Courts of Claims are discussed in the *Bond Debt Cases* (12 S. C., 200), and *Ex parte Childs* (12 S. C., 111).

The Act of 1907 creating the Commission gives no right of appeal nor does it contain the usual features of an Act creating a Court, but the Legislature was under no legal obligation to provide either any form of proceedings or to create a Court with the right of appeal to a Court for the benefit of its debtors. The relation of creditor and debtor existing between the State and the vendor of whiskey, such vendor had only the moral obligation of the State to look to for the fulfillment of its contract. The State certainly had the power, therefore, to prescribe any conditions it saw fit upon which these claims should be presented and paid, or to shield itself behind its immunity entirely against the payment of the debts. But certainly the power of investigation given by the Act was judicial in its nature. No contract was made by the Act of 1907 or intended to be made.

The case of *South Carolina vs. Gaillard*, 101 U. S., 433, we think, is directly in point. The General Assembly of South Carolina passed on June 9, 1877, an Act entitled "An Act to provide for the mode of proving bills of the Bank of the State tendered for taxes and the rules of evidence applicable thereto." While this Act was of force, Trenholm, a holder of certain bills of the Bank of the State, in pursuance of the Act, tendered such bills to the Treasurer of the county in payment of his taxes and contended that by complying with the provisions of the Act so as to allow the bills to be deposited with the Clerk of the Court to abide the

result of the proceeding that might be instituted with regard to them, the State entered into a new contract with him, by which it agreed to accept the bills tendered by him in payment of his taxes if he established their validity in the way provided. The Act was repealed. The Supreme Court of the United States held that this Act of 1877 created no new contract between the State and the taxpayer or bill-holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank; and that after the Act was repealed a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

If the Act of 1907 is nothing more than the creation of a Commission before which the State authorizes its creditors to sue and to have their claims established and adjusted, then it can not amount to a contract irrevocable, and this Court has repeatedly so decided:

Beers vs. Arkansas, 20 How., 527;
Railroad vs. Tennessee, 101 U. S., 337;
Railroad vs. Alabama, 101 U. S., 832;
Hans vs. Louisiana, 134 U. S., 17;
Baltzer vs. North Carolina, 161 U. S., 245;
Ex Parte Alabama, 23 Am. Rep., 567.

In *In re Ayers*, 123 U. S., 507, it is said:

"Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense."

And in *DeSaussure vs. Gaillard*, 127 U. S., 216, it is said:

"It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid. If granted, the action is in sub-

stance, though not in name, an action against the State itself, just as an action permitted by the Acts of Congress on the subject against a Collector of Customs for the recovery of duties alleged to have been illegally exacted, and paid under protest, is an action against the United States, though nominally against the Collector. In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject given by its own judicial tribunals are conclusive upon the parties seeking the benefit of them."

The State by this Act expressly devolves the right and duty upon the Commission to investigate, determine and ascertain the just liabilities against it held by these claimants, and does not authorize suits to be brought against it to establish such liabilities either in its own Courts or in the Federal Courts.

In the late case of *Smith vs. Reeves*, 178 U. S., 436, the Court, in construing a statute of California, held that by such statute the State had not consented to be sued except in its own Courts; that it was competent for the State to couple with its consent to be sued, on account of taxes alleged to have been exacted under illegal assessments made by the State Board, the condition that the suit be brought in one of its own Courts, and that the contention that the State could not restrict its consent to be sued to actions brought in its own Courts was incorrect. See, also, *Chandler vs. Dix*, 194 U. S., 590; *Maurcy vs. Commonwealth*, 92 Va., 310.

The Circuit Judge, as well as the Circuit Court of Appeals, proceeds upon the idea that the alleged creditors had acquired some vested right under the Act of 1907, and that some special trust in their favor had been fixed upon the funds held by the State Dispensary Commission. These parties, it is true, had made out a statement of their claims, and had them presented to and filed with the Commission and a roster had been arranged and a day fixed for the hearing of the respective claims, a distinct understanding being had upon the presentation of their claims that the same would be later investigated in an orderly manner. When

the claims were called they declined, however, to obey the legal orders of the Commission. By the terms of the Act itself, this Commission had all the powers conferred upon the committee appointed to investigate the affairs of the State Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, 1906, and one of the special powers given by Section 3 of that Act was the authority to require the production of any and all books, papers or other documents or writings which they should deem relevant to any investigation, and to require the persons in possession of said books, papers, etc., to produce the same before the committee; and, by Section 5 of the Act, the Commission had the power to withhold the payment of any claim of any creditor against the State Dispensary which they should deem advisable until the same was duly proven by the production of the books of original entry, and of all documents and correspondence relating to all their transactions with the State Dispensary, and to require any person or persons in possession of said books, documents, papers and correspondence to produce the same before the Commission in person. Yet this express authority was denied by the claimants, and they refused to proceed in the manner prescribed by the very tribunal created by the General Assembly before which they should establish and have their claims adjusted.

Subsequent, however, to the institution of the suit the Legislature, on the 21st of February, 1908, amended the Act of February 16, 1907, which Act is attached to the petition herein, and which it is submitted, creates a court and makes such provisions as entirely destroy any idea of a trust created in favor of the beneficiaries.

If, therefore, the Act of 1907 was not a contract, or of such nature as would prevent the Legislature from modifying or amending such Act as it pleases, then the Act of 1908, which was brought to the attention of the Court, has made such provisions as are absolutely inconsistent with any attempt on the part of any Court, State or Federal, to assume jurisdiction to declare and adjudge the amounts due by the State to the claimants, and to administer the fund, except as therein provided for.

The Supreme Court of the State of South Carolina, on the 14th of March, 1908, and a short while subsequent to the interlocutory order granting injunction and appointing receivers, in the case of the *State, ex rel. Lyon, Attorney-General, vs. The State Dispensary Commission*, held, substantially, that the Act of 1907 creating the State Dispensary and the remedies therein provided for, was a purely voluntary Act on the part of the Legislature of the State, and was subject to be repealed, and the allowance of the remedies therein provided for subject to be recalled at any time at the pleasure of the Legislature and in its discretion; that the State Dispensary was as much a part of the State government and as subject to as full investigation and control as the State Treasury; that the State Dispensary Commission were officers and agents of the State, and that the funds in their hands were the property of the State and held by them as its officers, subject to the control of the Legislature; and the possession of the State Dispensary Commission is the possession of the State. The construction so placed upon the statute by the highest Court of the State, if followed by this Court, would demand that the interlocutory orders made by the Circuit Court and affirmed by the Circuit Court of Appeals be vacated and the Bills of Complaint dismissed.

The rule laid down by this Court by one of its latest decisions is "The highest Court of the State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statute."

Batchel vs. Wilson, 204 U. S., 36.

We believe it sufficient to say, without a compilation of a vast number of citations, that the Federal Courts will follow, in this case, the decision of the Supreme Court of the State of South Carolina construing the Act of 1907, unless this Court shall take the view that the Act of 1907 created a contract with the claimants, creditors of the State, which the State can not, by subsequent legislation, interfere with.

Elmendorf vs. Taylor, 10 Wheat., 150;
Jefferson Branch Bank vs. Skelly, 1 Black, 436;
McCullough vs. Virginia, 172 U. S., 102;

Mobile Trans. Co. vs. Mobile, 187 U. S., 480;
Jack vs. Kansas, 199 U. S., 372;
Bacon vs. Texas, 163 U. S., 207;
Louisville Trust Co. vs. Cincinnati, 76 Fed., 296;
DeSaussure vs. Gaillard, 127 U. S., 216;
Lewis' Sutherland Stat. Constr., par. 313.

Where the Federal Courts are not by rule bound to follow the decisions of the State Courts in cases falling within the exception, they will consider such decisions upon the point in question and will incline to an agreement with the State Courts.

Mead vs. Portland, 200 U. S., 163;
Blair vs. City of Chicago, 201 U. S., 400;
Copper Mining Company vs. Territorial Board, etc., 206 U. S., 474;
Theological Seminary vs. Illinois, 188 U. S., 662;
Tampa Waterworks vs. Tampa, 199 U. S., 241;
Douglas vs. Kentucky, 168 U. S., 502.

(3) *Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund.*

The Circuit Court of Appeals held: "This suit is not against the State, nor is the State an indispensable party. Treating the funds in the hands of the appellants as a trust fund, and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties," etc. (Record, 368).

Assuming the construction of the Circuit Court of Appeals to be correct, that the legal title, possession and control of the property had passed to the Commission under the terms of the Act

of 1907, still, as these claims had to be established against the State, our assignment of error is that the State must necessarily be a party to such adjudication as one of the beneficiaries of the trust and one interested in the fund to be disposed of, and, being such indispensable party, under the rules and practices of the Court, the Court not being able to make the State a party, the bill must be dismissed, and the Court is without jurisdiction to proceed further.

The prayers of both bills of complaint are that it shall be referred to a master to ascertain and determine the amount due the complainants for goods sold and delivered by them to the State Dispensary, and that a decree be entered ordering and directing the amounts so found to be due to be paid. The State Dispensary Commission, neither as a Commission nor as individuals, have any personal interest in the funds. They have only certain official duties to perform. There is nothing in the statute which authorizes them to appear in court to prosecute or defend actions brought by these creditors against the State, nor has the State provided in such action that its law officer shall represent it in any judicial investigation in State or Federal Court; but the claims to be investigated and determined are claims and alleged debts not of the State Dispensary Commission, but of the State of South Carolina. For we conceive that, where it is referred to a person or commission to determine upon the liability of the donor, both legal and equitable, such person or commission, as such trustee, thereby created, can not be reduced to the rank of attorney and agent for the party and required to defend his interests. The sole party interested in defeating wholly or in part each any every one of these claims is not the Commission but the State of South Carolina, which is entitled to the remainder of the money after the payment of all just liabilities. The judgment to be rendered is a judgment not against the State Dispensary Commission, but in each and every one of these claims it is a judgment against the State of South Carolina, and if jurisdiction is retained we necessarily will have a case or cases where the complainants are prosecuting claims against the State of South Carolina as their debtor in a court in which the State is not represented and is not a party, and in which it is sought to enter a decree or judgment against

her and to take funds to satisfy such judgment or decree which otherwise would belong to the State, and which, under the terms of the Act, should be returned into her treasury.

The Circuit Court of Appeals also held that the provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors, and notwithstanding the State is the donor of the trust and is entitled to the surplus after the payment of its just liabilities to be ascertained by said Commission, and the expenses thereof, that it does not have any present interest in the fund in controversy which can be divested by a judicial determination of the true amount, if any, justly due the complainants, although it is not a party to such judicial investigation (Record, 366-367).

We respectfully submit that the Court of Appeals has committed error, and that the State is a necessary and indispensable party, even upon the assumption that the State has passed absolute control and possession of the property to the State Dispensary Commission.

In *Gregory vs. Stetson,* 133 U. S., 586, it is said:

"The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl. Sec. 72: 'It is a general rule in equity (subject to certain exceptions, which shall be hereatfer noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs os ar defendants, however numerous they may be, so that there may be a complete decree which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the

original parties therto.' See, also, Daniel's Chancery Pl. & Pr., 246 *et seq.*"

The Court further said:

"In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court can not adjudicate directly upon a person's rights without having him either actually or constructively before it. This principle is fundamental."

In the case of *Minnesota vs. Northern Securities Co.*, 184 U. S., 235, it is said:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, so that there may be a complete decree which shall bind them all. * * * The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasoning, and may be enforced by the courts *sua sponte*, though not raised by the pleadings or suggested by counsel;" citing cases.

Again, quoting from *Minnesota vs. Northern Securities Co., supra*:

"When it appears to a court of equity that a case otherwise presenting ground for its action can not be dealt with because of the absence of essential parties, and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in the case before the court, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend."

See, also, the late case of *Garzot vs. de Rubio*, 209 U. S., 297.

Where it is clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its

procedure, to grant the relief sought, it will refuse to take jurisdiction.

Cunningham vs. Macon R. R. Co., 106 U. S. 446.

A State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

Christian vs. Atlantic, etc., R. R., 133 U. S., 233.

We do not concede that these cases come within that class in which the interests of the State may be indirectly affected by judicial proceedings without making it a party, for in those cases the title in fee or the possession of the property is not in the State, but it only has some lien or claim against it subordinate to and not involvel in the prior claim; such as in the case where it is a subsequent mortgagee. There its rights of redemption will not be affected, nor is its right necessarily involved in that of the prior mortgagee. But in this case the claims that are to be presented are disputed in toto, and the State is a party to such contract and is the proper person to make the defense against such claims.

In *Vetterlein vs. Barnes*, 124 U. S., 167, the rule is recognized, that, to a suit against trustees to enforce the execution of the trust, *cestuis que trust* claiming present interests directly opposed to those of the plaintiff should be made parties in order that they may have opportunity themselves to defend their rights and not to be obliged to rely upon the defenses made by the trustees, or to resort to a subsequent suit against the trustees of the plaintiffs, or to take the risk of being bound by a decree rendered in their absence.

But it was also stated that the rule is different where the claim of the plaintiff antedates the creation of the trust and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it, as fraudulent and void.

Here it is claimed that the suit is brought to enforce the trust and not in opposition to the trust. The rule, therefore, must prevail that the State, as one of the beneficiaries of the trust and a party to these contracts, is entitled to set up all proper and legal defenses against these claims, and should be made a party to the suits, for its right to the surplus is directly dependent upon its defeating the claims which it disputes.

"In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous. If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties; but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be made parties."

Perry on Trusts, 3 ed., Sec. 595, citing *Houghton vs. Davis*, 23 Me., 28.

"When a trust is created for the benefit of certain specified creditors, and a suit is brought against the trustees for the execution of the trust, not only should those creditors generally be made parties, but the person who created the trust also, or his personal representative." Story, Eq. Pleadings (10th Edition), Sec. 149.

See, also, Story's Equity Pleading, 10th ed., Secs. 149 and 207; 6 Pomeroy's Equity Jurisprudence, Secs. 713, 891.

"The true principle would seem to be that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent or validity of the assignment is not doubted or denied, and there is no remaining liability of the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case.* * * But, where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, there he is not only a proper but a necessary party. The general rule will hereafter occur under other

aspects where the legal estate is in one person and the equitable estate is in another, and where the equitable or legal interest assigned still leaves some rights or claims to be settled in which the presence of the assignor may be material to his own interests or to those of the adverse party."

Story's Eq. Pl., 10 ed., Sec. 153, and notes.

In *Barney vs. Baltimore City,* 6 Wall., 280, it is said:

"There is a third class (of parties) whose interest in the subject-matter of the suit and the relief sought is so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the Court can not proceed. In such cases the Court refuses to entertain the suit, and these parties can not be subjected to its jurisdiction."

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, where a person will be directly affected by a decree he is an indispensable party, unless the parties are too numerous to be brought before the Court, when the case is subject to a special rule. Secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if it is possible, and the Court will not proceed to a decree without him if he can be reached. Thirdly, where he was not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

Williams vs. Bankhead, 19 Wall., 571.

Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund and liable by a decree to have it wholly swept from him is an indispensable party.

Williams vs. Bankhead, 19 Wall., 563.

Upon a bill filed by the United States proceeding as an ordinary creditor against a debtor of its debtor for an accounting, etc., the original debtor to the United States ought to be made a party to the account taken between him and his debter.

United States vs. Howland and Allen, 4 Wheat., 108.

The reason is that a decree in favor of the United States against the debtor of its debtor would not be binding against the original debtor of the United States, and, therefore, the original debtor must be made a party to the suit.

If the rights of those not before the Court are inseparably connected with the claim of the parties litigant, so that a final decision can not be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties.

Mallow vs. Hinde, 12 Wheat., 194.

The amount due these complainants, as appears from the record, is not fixed, but is open to controversy, and, as is said in *Mallow vs. Hinde, supra,* no Court can adjudicate directly upon a person's right without the party being actually or constructively before the Court.

Chadbourne vs. Coe, 45 Fed., 822;
Ribon vs. Railroad Cos., 16 Wall., 450.

In the case of *Shields vs. Barrow,* Justice Curtis, after citing the case of *Russell vs. Clark's Executors,* 7 Cranch, 98, proceeds to classify parties to a bill in equity. He makes three classes of them: (1) formal parties; (2) persons having an interest in the controversy and who ought to be made parties in order that the Court may act on that rule which requires it to decide on a final determination the entire controversy, and to do complete justice by adjusting all the rights involved in it; while such persons are commonly termed necessary parties, yet if their interests are separable from those of the parties before the Court, so that the Court can proceed to a decree and do complete and final justice without affecting other persons not before the Court, they are

not considered indispensable parties; (3) persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

In this last class certainly this case must fall, because the State not only has an interest in the controversy as to the removal of the Commission, who, under the theory of the Circuit Court of Appeals, must be considered trustees, and as to the disposition of the fund, but its financial interest as to what shall be the surplus is of such a nature that a decree entered upon the claim of complainants to these bills must of necessity affect its rights in and to the assets held by such trustees, for if it be conceded that the Court may proceed to judgment to determine what is the just liability in these cases of the State to these parties, the State can not be concluded by such judgment unless such trustees represent it to such an extent as to be in fact and in reality the agents of the State under statutory duty to defend the interests of the State. For, if the State can, as is admitted by the Circuit Court of Appeals, intervene and set up the defenses indicated in the return of the Commission, and set out in the opinion of the Court, then the decree which would be rendered without such intervention would not be conclusive upon the State, because it had never had its day in Court. If, then, such determination, in the absence of the State, is not conclusive upon it, it follows necessarily that before effect can be given to the judgment of the Court the State should have been a party to the suit. The illustrations given by Mr. Justice Curtise in *Shields vs. Barrow* fully illustrate the necessity of the debtor, the State, being made a party to these suits.

Yet it is said by the learned Circuit Court of Appeals:

"It is insisted that the claims involved in this controversy, if due, are debts of the State, and appellants say that they represent the State, which is the real party in interest; yet, in this situation, they contend that in case of a dispute as to he validity of any of the claims, it should be left to them to decide. In other words, their position appears to be that the agents and representa-

tives of the debtor should constitute a tribunal, absolute in its character, to arbitrarily pass upon what, if anything, is due an alleged creditor, and if a claim be adjudged invalid to put an end to it without further opportunity for redress on the part of the creditor. To uphold such contention would, in our opinion, in the event that a just debt due a creditor was thus rejected, deprive such creditor of his property without due process of law." (Record, 368-369).

Unless the very confessedly novel view of the learned Circuit Court expressed in another part of the opinion, that the State of South Carolina having under its constitution and in the exercise of its police power attempted to regulate the sale and use of intoxicating liquors within its borders through certain of its own officers, could under no circumstances be immune from suit by reason of or on account of any debt contracted thereby, is correct, these alleged creditors of the State had no remedy whatsoever for the collection of their claims and could in no wise determine the mode of procedure, or the tribunal before whom they should be permitted to prove their claims. The Act, then, of 1907 was voluntary upon the part of the State, and if it created the State Dispensary Commission, a Commission to investigate and determine these claims, certainly the action of such Commission in contending that it should itself determine, as agents and representatives of the debtor, the claims before it, is not an improper construction of the Act, and the exercise of their duties can not be said to deprive the claimant of his property without due process of law. The proposition of the learned Court, therefore, that they (Commission) should constitute a tribunal absolute in its character to arbitrarily pass upon what, if anything, is due an alleged creditor, and if the claim be adjudged invalid to put an end to it without further opportunity for redress on the part of the creditor, is to deprive him of his property without due process of law, is, it is respectfully submitted, more novel than the question which the Court distinctly states that it is not its purpose to venture an opinion upon, and upon which it is very careful to say that it has no authority in point to guide it. Should a tribunal such as this, contrary to law and common right, proceed to declare a claim unjust and invalid, and to violate every principle recognized in the ascertainment of truth and the administra-

tion of justice, without remedy for such claimant, that would present an entirely different proposition, for here we must assume that there are remedies for the just and honest creditor who has been so treated, even contained in the terms and provisions of this statute itself.

It is submitted that the State to these actions not only is entitled to be heard as against the claims presented to the Court for determination against it, but is also a necessary party to an action which seeks to remove the trustees which it has solemnly appointed to determine the questions of liability between it and its alleged creditors in a manner and mode set out and prescribed by itself, with full authority and power at the time so to do.

FINALLY.

The petitioners submit:

That the fund in the hands of the Commission is property belonging to the State of South Carolina and in her possession, through her agents, the members of the Commission;

That these suits are, in effect, suits against the State, inasmuch as they must result in judgments being declared against the State upon contracts to which she is a party, and in the enforcement of such judgments taking away her property and applying it to the payment thereof; or else in judgments in her favor declaring these contracts void, or for less amounts than claimed;

That what is sought in these suits is not to require the Commission, as officers of the State, to perform duties imposed by the statute, but their purpose to usurp the duties and functions of the Commission and to substitute in place of its judicial discretion that of the Circuit Court;

That if these be not suits against the State, then they are such proceedings that the State is a necessary or indispensable party thereto, without which the Court can not proceed to judgment without necessarily and injuriously affecting the State in her financial interests and property rights. To protect this financial interest, and fulfill the duty imposed by the Constitution of preserving the net income arising from the past operations of this State department or institution—the State Dispensary—the State can not stand idly by while the inquiry is proceeding and her funds being taken and applied to the payment of claims which she avers are illegal and fraudulent; but must, if she would perform her duty and protect her property, be forced into litigation upon the question of the validity and amount of the claims which it is alleged she owes to these whiskey houses.

J. FRASER LYON,
B. L. ABNEY,
Counsel for Petitioners.

APPENDIX.

CONSTITUTIONAL PROVISIONS.

Article VIII, Section 11, Constitution 1895.

"In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower State, county and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same."

Article XI, Section 12, Constitution, 1895.

"All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this Article; and if after said application there should be a surplus, it shall be devoted to public school purposes, and apportioned as the General Assembly may

determine: *Provided, however,* That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

STATUTES AND RESOLUTIONS.

(1.)

A CONCURRENT RESOLUTION.

To Investigate the State Dispensary.

Be it resolved by the Senate, the House of Representatives concurring:

SECTION 1. That a Joint Committee, consisting of three Senators and four members of the House of Representatives, be appointed by the presiding officers of the respective Houses to investigate the affairs of the State Dispensary.

SEC. 2. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to appoint an expert accountant and stenographer, and to investigate all transactions concerning said Dispensary and its management, and to take testimony either within or without the State, and shall have access at all times during their service to all the books and vouchers and other papers of said institution, especially in investigating the following facts:

(a) Whether or not it is a fact that houses represented by agents who are near relatives of the members of the Board of Directors, receive large orders at each purchase.

(b) Is it a fact that members of the Board of Directors are, or have been, agents for certain wholesale houses from which large purchases are made?

(c) Is it a fact that parties to whom large orders are given are not wholesale dealers, but brokers, and that the orders are filled by third persons, thus making the State pay the commissions of the middle-man?

(d) Was it necessary to purchase the large quantity of liquors ordered in December, 1904, to fill demands and especially the new and fancy goods purchased, which is unknown to the trade?

(e) Are the extraordinary heavy purchases made necessary to the best business interest of the Dispensary system?

(f) What is the financial standing of the business, and is it run on the best principles for the interest of the law as originally passed and amended?

(g) Is it a fact that the State, through the Dispensaries, is violating the Constitution of 1895, in that it is selling whiskey in less quantities than one-half of one pint?

(h) Is it a fact that the State is selling 5's in case goods to its customers and charging them for one quart?

(i) Is it a fact that certain agents are traveling over the State and offering special inducements to County Dispensers to "push" certain brands of liquors, and, if so, is it a fact known to the members of the State Board of Directors?

(j) Is it a fact that certain requirements of the law are dispensed with by County Dispensers by order of, or by the consent of, the members of the State Board of Directors?

(k) Has the whiskey which has been recently purchased been ordered out from the dealer, or is it held in reserve for future delivery?

(l) What is the indebtedness of the Dispensary for liquors which have been bought but not delivered?

(m) And any and all other matters relating to the management of the State Dispensary, and of any official or person in relation thereto.

(n) Is it, or not, a fact that excessive freights have been paid to railroads for transporting liquors into the State, when said liquors could have been shipped into the State by water at less cost to the State?

(nn) Whether there is any warrant of law or authority for the establishment and conduct of what is commonly known as "Beer Dispensaries," as they are now and have been conducted.

SEC. 3. That said Committee may at any time they may deem it advisable call to their assistance any of the State officers or employees of the State Dispensary, whose duty it shall be to render the said Committee any reasonable service that may be

required of them within the scope of its functions as prescribed by these Resolutions.

SEC. 4. That the said Committee shall convene as soon after the adjournment of this session of the General Assembly as practical, and shall organize by electing one of their number as Chairman, and shall report its findings to the next session of the General Assembly. That said Committee shall receive the same per diem and mileage as members of the General Assembly, and that the sessions of said Committee be open to the public.

SEC. 5. That nothing herein contained shall be construed to deny the said Committee the power to apply at any time to the General Assembly for such other power and authority as the circumstances arising during the investigation may seem to require.

SEC. 6. That said Committee shall have the right to punish for contempt as Courts of Common Pleas and General Sessions.

SEC. 7. That said Committee shall have a Marshal to serve its processes and keep order at its sessions, and his pay shall be fixed by said Committee. The pay of the witnesses shall be the same as that of witnesses in the Court of Common Pleas for Richland County, and all expenses shall be paid on the warrant of the Chairman of said Committee by the Liquor Commissioner out of the General Dispensary fund and charged as Dispensary expenses.

SEC. 8. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to employ expert accountants and stenographers and any other person or persons the Committee may consider necessary in the ascertainment of any facts pertinent to this inquiry; and said Committee is hereby authorized and empowered to investigate and inquire into all transactions connected with said State Dispensary and its management or control at any time in the present or past, and to investigate any and all purchases, sales, shipments, contracts, or other like transactions; and the personal connection, if any, of any member or members of the State Board of Control, or the State Liquor Commissioner, or any other citizen or official of this State, in the present or past, with any other corporation, concern or individual contracting with or supplying any spirituous

or intoxicating liquors, or other goods or commodities to said Board or Commissioner, or to the State; to take testimony either within or without the State; and to have access to all the books and vouchers and other papers of said institution or of any officer or employee thereof.

SEC. 9. That the costs and expenses of this investigation be paid by the State Dispensary, each member of said Commission to receive $4.00 per day and the usual mileage.

Passed January 31, 1905.

(2.)

AN ACT TO PROVIDE FOR THE INVESTIGATION OF THE DISPENSARY.

Whereas, a Committee has been appointed to investigate the State Dispensary under the Concurrent Resolution of the General Assembly, dated the 31st day of January, 1905; and whereas, in the progress of the work of the said Committee some doubt has arisen as to the power of the said Committee in the discharge of their duties; and it being provided in Section 5 of said Concurrent Resolution that the said Committee should apply to the General Assembly for such other power and authority as the circumstances arising during this investigation may seem to require; therefore,

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the Committee heretofore appointed under the terms of the Concurrent Resolution, dated the 31st day of January, 1905, or any other Committee or Committees that may be appointed, are hereby authorized and empowered to elect a Marshal, who, [illegible] being sworn, shall be and become a peace officer of the State, and invested with all the power of Sheriffs and Constables in the service of any and all process issued by the Committee aforesaid, and with the power to arrest and imprison, upon the order of the said Committee, any and all persons who shall fail and refuse to obey any legal order of the said Committee, or who shall be guilty of any disorderly conduct in the presence of said Committee during any session thereof, or who shall be guilty of any contempt of the said Committee.

SEC. 2. The said Committee be, and are hereby, authorized and empowered to call before them by summons or notice, in such form as the Committee may adopt, and to be served by the Marshal of said Committee, or such other officer of the State as may be by the Committee required, such person or persons as the Committee deem proper, and to require such person or persons to answer, upon oath, any and all questions that the Committee may deem relevant and may propound to him or them; and upon the failure or refusal of such person or persons to obey such summons or notice, or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said Committee, and may be imprisoned upon the order of the said Committee in the common jail, to be there held until he or they shall comply with the order of the said Committee: *Provided*, That no testimony given by said witness shall be used against them in a criminal prosecution.

SEC. 3. The said Committee be, and the same is hereby, authorized to send for and to require the production of any and all books, papers, or other documents or writings which may be deemed relevant to any investigation, and to require said person or persons in custody or possession of said papers to produce the same before the said Committee, and any person or persons who shall fail or refuse to act on the order or notice of said Committee to produce said books, papers, or other documents, or writings, shall be deemed guilty of contempt of said Committee and be punished as provided in Section 2.

SEC. 4. Said Committee shall have power to administer necessary oaths, and any person who shall, after being sworn before said Committee, swear falsely, shall be deemed guilty of perjury, and, upon conviction, shall be punished as provided by law.

SEC. 5. That said Committee be, and they are hereby, authorized and directed to order the Commissioner of the State Dispensary to withhold the payment of any claims against the State Dispensary or any officer thereof, or the claims of any creditor against said State Dispensary or any of its officers, which they may deem advisable, until same is duly proved by the production of the books of the original entry, and all documents and correspondence relating to all their transactions with the State Dispensary, and to require the person or persons in custody or pos-

session of said books, documents, papers, and correspondence to produce the same before the said Committee in person, and when such proof has been submitted to and approved by the said Committee, and the State Treasurer is hereby forbidden to pay such claims upon written notice from the Chairman of the said Committee.

SEC. 6. This Act shall take effect and be in force immediately upon its approval by the Governor.

Approved the 24th day of January, A. D. 1906.

(3.)

AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY, AND TO WIND UP ITS AFFAIRS.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well-known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

SEC. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel

as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further,* That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said Commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on this Commission after January 1, 1908.

SEC. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

SEC. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

SEC. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided,* That for the purpose of the investigation of the affairs of the Dispensary, as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D. 1907.

(4.)

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY AND TO WIND UP ITS AFFAIRS," SO AS TO PROVIDE COMPENSATION FOR MEMBERS OF THE SAID COMMISSION FOR THE YEAR 1908, AND TO PROVIDE FOR THE SALE OF THE REAL ESTATE HERETOFORE USED IN CONDUCTING THE DISPENSARY, AND TO FURTHER PROVIDE FOR WINDING UP THE AFFAIRS OF THE STATE DISPENSARY.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That an Act entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs," approved the 16th day of February, 1907, be, and the same is hereby, amended by striking out the figure 8 at the end of Section 4, and inserting in lieu thereof the figure 9, and by adding at the end of said section the following: "That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of ($150.00) one hundred and fifty dollars:" *Provided, further,* That the per diem provided for herein shall begin on the date of the approval of this Act.

SEC. 2. That said Act be further amended by adding at the end thereof the following as Section 9: "Section 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, the typewriters, adding machines, files, metal, and other furniture in the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided,* That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same: *Provided, further,* That the typewriters, adding machines, files, metal, and other furniture may be trans-

ferred by the Commissioners of the Sinking Fund to any of the State offices that, in the judgment of the Commissioners, may need them.

SEC. 3. That said Act be further amended by adding the following as Section 10: "Section 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State, and arising from the assets of the Dispensary."

SEC. 4. That said Act be further amended by adding the following as Section 11: "Section 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary, and to pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have been, or may hereafter be collected by said State Dispensary Commission: *Provided*, That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court as in cases at law: *Provided further*, That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court." So that said Act, when so amended, shall read as follows:

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.00.

Sec. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

Sec. 3. It shall be the duty of said Commission to close out

the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided,* That no alcoholic liquors or beers shall be disposed of within this State, except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further,* That all payments shall be made in gold and silver coin of the United States currency or in national bank notes.

Sec. 4. The compensation of each member of said Commission shall be five dollars ($5.00) per day for each day actually employed about the business and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on this Commission after January 1, 1909; *Provided further,* That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of one hundred and fifty dollars ($150.00): *Provided, further,* That the per diem provided for herein shall begin on the date of the approval of this Act.

Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants, and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

Sec. 8. The said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided*, That for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Sec. 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required, upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell the same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided*, That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same.

Sec. 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammett and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State and arising from the assets of the Dispensary.

Sec 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the

State growing out of dealings with the Dispensary. And to pay for the State any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have or may hereafter be collected by said State Dispensary Commission: *Provided,* That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court, as in cases at law: *Provided, further,* That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court.

Sec. 12. That no funds arising from the sale of the assets of the former State Dispensary, or from the collection of debts due the said Dispensary, or moneys delivered by the State Treasury to said Commission, shall be paid out for any purpose or to any person whatsoever, except upon the check of the chairman of said Commission, countersigned by the Treasurer of the State of South Carolina. And the Treasurer of the State of South Carolina shall countersign such checks as may be presented by the chairman of said Commission only upon presentation of the same, together with a certificate of said Commission or a majority thereof, which certificate shall show: that the said check is issued in payment of some expense provided for by statute, or necessarily incident to closing up the affairs of the Dispensary, or for services rendered said Commission in closing up the affairs of said Dispensary, or contracted for in accordance with law by said State Dispensary Commission, or that it is in payment of a claim of a creditor which has been adjudged by said Commission to be due, and upon such adjudication ordered paid.

In the Senate-House the 21st day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.
RICHARD S. WHALEY,
Speaker of the House of Representatives.
Approved the 24th day of February, A. D. 1908.
M. F. ANSEL,
Governor.

(5.)

AN ACT TO MAKE APPROPRIATION TO MEET THE EXPENSES OF CRIMINAL PROSECUTIONS AND PROCEEDINGS AGAINST CERTAIN OFFICERS AND OTHER PERSONS, AND TO PROVIDE FOR THE PAYMENT THEREOF.

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and is hereby, appropriated to meet the expenses of any criminal prosecutions that have been or may be commenced against any person or persons charged with violation of the law in any manner connected with the late institution called the State Dispensary, including expenses of associate counsel, and such other expenses as may be incident thereto: *Provided,* That the Attorney-General shall not employ any member of the General Assembly as attorney in said prosecutions.

Sec. 2. That the said sum of fifteen thousand dollars shall be paid into the State Treasury by the State Dispensary Commission out of any funds in its hands arising from the business or property of the State Dispensary, and the same shall be paid out by the State Treasurer upon the warrant of the Comptroller-General; and accounted for in the same manner as other funds appropriated for the use of the Attorney-General's office.

Sec. 3. That this Act shall take effect immediately upon its approval by the Governor.

In the Senate-House the 22d day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.
RICHARD S. WHALEY,
Speaker of the House of Representatives.

Approved the 24th day of February, A. D. 1908.

M. F. ANSEL,
Governor.

FILED
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 615.

W. J. MURRAY, JOHN McSWEEN AND AVERY PATTON,

Constituting the Dispensary Commission of South Carolina et. al., Petitioners,

vs.

THE WILSON DISTILLING CO. *et. al.*, AND THE FLEISCHMANN CO.

BRIEF OF W. F. STEVENSON AND D. S. MATHESON, FOR PETITIONERS IN REPLY.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, *et. al.*,
Petitioners,

vs.

THE WILSON DISTILLING CO. *et. al.*

BRIEF OF W. F. STEVENSON AND D. S. MATHESON, IN REPLY IN UNITED STATES SUPREME COURT FOR APPELLANTS.

The facts are fully stated in the briefs of appellants attorneys, on motion for Writ of Certiorari and on opening argument. It is only my intention to reply to some of the arguments put forth by Appellees heretofore and on motion for Certiorari.

Two positions are taken:

1st. That the dispensary commissioners are trustees for the benefit of creditors of the State and

2nd. That the suit is not against the State and the State is not a necessary party to the proceeding in equity.

We will note first the admitted facts:

(a) That Sotuh Carolina owned the business and assets before the Acts of February 16, 1907, and that the claims for purchase money are the State's debts.

This must necessarily be the case on the theory of the defendants because they claim that she conveyed the assets to the dispensary commission in trust for her creditors. She could not create a trust estate out of property not her own.

(b) It is admitted that she owns the surplus after all just liabilities arising out of the dispensary business is paid.

5

(c) It is admitted that the claims of appellees are in dispute and must be settled in some forum.

This is shown by the opinion of the Circuit Court of Appeals, page 361, record. The following question is asked: "The fund being in the hands of the commission charged with this duty, to the state has no interest in so much thereof as is necessary to pay the just debts. Then how can it infringe any right
6 of the State to have the true amount of the debts due by the defunct dispensary judicially ascertained?"

It is also shown by each bill the prayer being for the proper orders to ascertain the amount due on their respective claims. (See pages 5 and 27 of the Record.)

(d) Therefore it is admitted that no decree can be rendered on any claim in suit that will not effect
7 directly the pecuniary interest of South Carolina by either increasing or diminishing the amount of the surplus going to her. Add $1,000 to the Fleischman account and you take away that amount from the State and this brings the case squarely within the case of Reagan vs. Home Loan and Trust Co., 154 U. S. 388, cited by appellees. We quote:

"To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh
8 Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with

such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against the State by name, but those also against its officers, agents and representatives, where the State, though, not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

"Appellants insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of State officers under a constitutional statute is not subject to challenge in the Federal Court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its government character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental *interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered.*"

The Court will note that the concluding sentence in the citation lays emphasis upon the fact that the government interest indirectly affected was not a pecuniary interest and that not a dollar would be taken from the treasury of the State and no pecuniary obligations would be enforced nor any of its property affected by the decree, and hence they held in that case that the State was not a necessary party, plainly
13 inferring that if the pecuniary interest of the State were directly affected, it could not be maintained. The Reagan case was one as to rates on railroads and not as to State funds. Our first position is that the state is a necessary party, it being admitted that the State's pecuniary interest is directly affected by every decree rendered, counsel for appellees endeavor to escape the universal rule that you cannot adjudge against a party not before the court by first resorting
14 to the assumption that courts can do no wrong. We find the brief of Messrs. Bernard & Lester in the court below contains the following: "The State has provided that the just liabilities of the State dispensary should be paid, and certainly it cannot be presumed that the court will not fully protect the interests of the State in deciding what is a just liability." See also page 16 of brief against certiorari. No presumption exists that any court will make an un-
15 just decree without the parties whose interests are affected by it are before the court. It is a universal rule, crystalized in the constitution of the United States and all the States, that to adjudge right when the owner of the right is not before the court is taking property without due process of law and void and it is as true when the right is that of the State as when it is that of an individual. While it is presumed the court will do justly it cannot do anything valid at all affecting the State's interest in a fund un-
16 less the State is before the court. In Pennoyer vs. Neff, 95 U. S., 714, it is laid down that a judgment

rendered without the service in the State or voluntary appearance of the party upon whom alone it operates is null and cannot be relied upon for any purpose as being without due process of law. Now, no doubt the court rendering the judgment was "presumed" to do right, but that did not dispense with presence of the defendant. But the learned counsel for Wilson Distilling Company, recognizing this says (page 44 of their brief filed in opposition to *Certiorari*): "In other words that it being their duty to see that the surplus was paid to the State after debts contracted for the purchase of liquor had been extinguished, the State was and is, through them constructively before the Court, as the record now stands." Is this true? If so, the Court had no jurisdiction. We find them going in this circle. The suit is not against the State, therefore the State not being before the Court, the Court has jurisdiction, but the State is before the Court constructively, and a decree directly affecting its pecuniary interests can be rendered; anyway as the Court is presumed to do justice whether the party is before the Court or not, it is all right.

17

18

Our friends go on and say, page 45: "The presence of the State, therefore, was only necessary to fix the amount to be paid the creditors and so long as the commissioners are before the court the State is represented by and through them and her interests can be thus fully protected." Again on page 46: "If, therefore, the object of the winding up statute in the case before the Court was to ascertain primarily what debts were due, and the commissioners themselves were to determine, as representing the State, as they claim, then the State as a beneficiary is constructively before the Court as the matter now stands." This is another admission that the State is a party in essence, and that therefore the Court has no jurisdiction.

19

20

Our second position is that the State is shown by the bills (pp. 22 and 111 Record) to have an interest in the fund, there being more than the amount necessary to pay claims filed and the surplus being admittedly less. Indeed, if there was no surplus but a prospective deficit, she would be equally interested for she is the debtor and in good conscience must pay any balance left due after the application of the
21 assets. Our further position is that she committed the determination of the balance due to the commission and was willing to risk the commission alone to determine that and she had a right to prescribe the form in which the claim should be established and to change that provision at will. The attorneys for Fleischmann Company concede that the State intended that the commission should determine the justness and necessarily the amount of all claims.
22 Page 16 of their argument against certiorari they say: "It is plain from the provisions of the act itself that the State of South Carolina intended that the question of whether or not a claim presented to the commission was a just liability of the State dispensary should be settled by the commission." This being the case it is clear that the commission was within its rights in settling these questions and that they had absolutely no personal interest in the result of
23 the litigation and are clothed with a discretion which could not be controlled by the Court and any judgment against them would not affect them, but the State, and the action is therefore essentially against the State and will result in the enforcement of the performance by the State of an alleged contract which makes it a suit against the State. In Hagood vs. Southern, 117 U. S., 67 and 68, this Court defines this rule as follows:

24 "The controversy in which the validity and obligation of the script are involved is the subject of the

present suits. The complainants as holders of this script, in behalf of themselves and all other holders choosing to take part, are seeking to obtain, by judicial process, its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection, and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protecting from violation by the Constitution of the 25
United States. And such are the decrees which have been rendered according to the prayers of the bills. The suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought be- 26
fore the court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party.

The citations could be multiplied but they are all to the same effect.

If the suit under this definition is against the state 27
that ends it.

Now how do they attempt to evade this position? They say that the commission is a trustee for an express purpose and has a certain fund in its possession put there for plaintiff and other creditors of the dispensary. They ignore the fact that it is also for the State, which has an iterest in the fund, increased or diminished, by the amount of the other claims. 28
They cite McKee vs. Laman, 159 U. S., 317, to support this position. In that case the Cherokee

nation had agreed to pay Laman's firm 30 per cent. of all collections on a certain claim. They also had the money paid over to McKee under a contract with him that he should pay the claim of Laman. The Choctaw nation got 70 per cent. and McKee 30 per cent., and then refused to pay Laman and set up that the suit to make him do so was a suit against the Choctaw nation. The Court says: "The
29 suit is neither directly nor indirectly against the Choctaw nation and if made a party defendant would the complainants be entitled to relief against the nation? No claim is made against it * * * By its second contract it agreed to pay the same 30 per cent. upon an amendment which had already been fixed." * * * "The Choctaw nation had really no interest in the 30 per cent. The stipulation was made by Blunt & McKee for the benefit of the part-
30 ies interested in the per centage, and as soon as the money was recovered by them or either of them they would hold it as trustees for the persons legally and equitably entitled to it."

The plain inference is that if the Choctaw nation had an interest in the fund the suit could not proceed. If the dispensary commission had been directed to collect the assets and pay over 30 per cent. of it to the creditors then the State would not be en-
31 titled to be heard, but she is one of the parties legally and equitably entitled to the fund, and her rights can only be adjudicated by the Court when she is present. They cite also (page 16, Bernard & Lester brief against certiorari) Board of Liquidation vs. McComb, 92 U. S., 531. That case makes no holding as to trusts created by a State, but does hold the following: "A State without its consent cannot be sued by an individual, and a court cannot substi-
32 tute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter." Here is shown above the commission

was in the first instance clearly vested with discretion to allow or disallow a claim and that discretion cannot be usurped by any court. In the case cited the court merely stepped in to prevent the Board of Liquidation from misapplying the bonds of the State in plain violation of the State's contract, under color of an unconstitutional statute violating said contract with the plaintiff.

Messrs. Bernard & Lester also cite Ford vs. Delta Pine Land Co., 164 U. S. 662, as to the trust feature of their argument. In that case the State of Mississippi created a levee board and directed that they issue bonds to close up levee debts and pledged all taxes and other assets of the board to secure same. The creditors took said bond on said pledge and when default was made a holder brought an action against the board to require it to apply the assets to said purpose. There was no dispute about the amount due on the bonds. The Supreme Court of Mississippi held that the bondholders had a right to have the security so applied. This Court decided the case in favor of the State on another point, but say: "Be that as it may, this decision, followed as it was by subsequent decisions of the Supreme Court, is a construction of the Act of 1867, which is not only binding on this Court but commends itself to our judgment." So instead of deciding the case on any trust ground they decided that feature of it on the ground that the decision of the State court on another ground entirely was binding on this Court, and this too on appeal from the Circuit Court of the United States.

They cite Chaffraix vs. Board of Liquidation, 11 Fed. 638. But this case was stated by Judge Pardee to depend on the decision of the Elliott case then in this court, and that case is reported with the Jumel case, 107 U. S., 711, and they expressly repudiate

the trust theory and say: "It is insisted that the money in the treasury collected from the tax levied for the year 1879 constitutes a trust fund of which the individual defendants (Board of Liquidation) are trustees, and that they may be enjoined as such trustees from diverting it from the purposes for which it was pledged under contract." The Court says: "The treasurer is no more a trustee of these moneys
37 than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued, the trustee cannot be enjoined. The officers owe duty to the State alone and have no contract relations with the bondholders." So fell the great case of Chaffraix vs. Board of Liquidation, the very same fund being in controversy, and Judge Pardee expressly stating in the opinion that the de-
38 cision of the Elliott case, then in United States Supreme Court, would determine the question and it swept away the theory of Judge Pardee and established that of Judge Billings. They cite: Swasy vs. A. & N. C. R. R. Co., 23 Fed. Cases 518. But this is distinctively repudiated in Christian vs. A. & N. R. R. Co., 133 U. S., 241, in the following:

"How the dividends due to the State can be seized and appropriated to the payment of the bonds, or
39 how the stock held and owned by the State can be sold and transferred through the medium of a suit in equity without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is that all persons whose interests are directly to be affected by a suit in chancery must be made parties. Russell vs. Clarke's Executors, 7 Cranch, 68, 98; Shields vs. Barrow, 17 How., 130, 139; Ribon vs. Railroad Cos., 16 Wall., 446; Williams
40 vs. Bankhead, 19 Wall., 563; McArthur vs. Scott, 113 U. S., 340. The exceptions of the rule are pointed out in these cases, and do not touch the

present case. The State has a direct interest to be affected by such a proceeding. The proposal is to take the property of the State and apply it to the payment of its debts due to the plaintiff, and to do it through the instrumentality of a court of equity. * *

"If the mortgagor be a private person the mortgagee may cite him to court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in 41
such a proceeding. Even when absent beyond the reach of process, he must still be made a party, and at least constructively cited by publication or otherwise. This is established by the authorities before referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in
possession is a sovereign State, no such proceeding 42
can be obtained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the Eleventh Amendment that the judicial 43
power of the United States shall not be construed to extend to such suits. New Hampshire vs. Louisiana, 108, U. S., 76; Louisiana vs. Jumel, 107, U. S., 711; Parsons vs. Marye, 114 U. S., 325; Hagood vs. Southern, 117 U. S., 52. In re Ayers, 123, U. S., 443. * * *

"It remains true, therefore, that a Bill will not lie to effect a foreclosure or sale, or to obtain possession of property belonging to the State; for the 44
very plain reason that, in such a case, the State is a

necessary party and cannot be sued. This was distinctly held by this court in the case of Cunningham vs. Macon and Brunswick Railroad, 109 U. S., 446. * * *

"Whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rule which governs its procedure, to grant the relief sought, it will refuse to take jurisdiction.'
45 Again: 'In the case now under consideration, the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the
46 actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property of which she has both the title and the possession.'

"These remarks are strikingly applicable to the present case. The State of North Carolina is the only party really concerned. The whole proceeding
47 is really against her. The object of the suit is to get possession of her property; to sequester her dividends (if any there may be) and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in sole possession. Be it true that the bondholders have a lien on said dividends and stock it is not a lien that can be enforced without suit, and that a suit against the State.

48 "We are referred to a decision made at the Circuit by Chief Justice Wait in the case of Swasey vs. North Carolina Railroad Co., 1 Hughes, C. Ct. 17,

in which, in a case similar to the present, it was held that, inasmuch as the shares of stock belonging to the State were pledged for the payment of complainant's bonds, they were held by the railroad company as trustees for the bondholders as well as the State; and that if the trustee was a party to the suit it was not necessary that the State should be a party. We are not certain that we are fully in possession of the facts of that case; but if they were the same as in the present case, with the highest respect for the opinions of the lamented Chief Justice, we cannot consent to the conclusions to which he arrived. In the general principles that a State cannot be sued; that its property, in the possession of its own officers and agents cannot be reached by its creditors by means of judicial process, and that in any such proceedings the State is an indispensable party; Chief Justice Waite certainly did express his emphatic concurrence in the able opinion delivered by him on behalf of the Court in the case of Louisiana vs. Jumel, 107, U. S., 711. His views in Swasey case seem to have been based on the notion that the stock of the State was lodged in the hands of the railroad company as a trustee for the parties concerned, and was not in the hands of the State itself, or of its immediate officers and agents."

So the cases cited on the trust question are mostly overruled cases and these not overruled have no bearing on the case at bar.

They cite Clews vs. Jamison, 182 U. S. 461, and that case merely establishes the rule that where money is deposited with a stakeholder under certain rules of the stock exchange by two parties to a contract to be paid out on certain conditions, the stakeholder becomes a trustee for the parties in interest, and if a dispute arises as to whether the terms have been complied with, the court of equity can inter-

vene and enforce the trust, the Court saying: "The maintenance of this suit enables the whole question between all the parties to be determined therein. * * * Such relief cannot be obtained in any action at law." As the Court will see the case was largely one of construction of the rules of the stock exchange and the Court assumed jurisdiction because "with all parties before it," it could do full
53 justice, the ability to have all parties before it, the "trustor," as the State is called by the C. C. A. as well as the trustee and *cestui que trust* and settle all disputes between them. This case strongly sustains our position that the State is a necessary party. The party putting the fund in the hands of the governing committee as well as the party claiming the same being both before the Court with the committee, the Court sustains the jurisdiction of equity ex-
54 pressly on that ground.

The case of Baring vs. Dabney, 19 Wallace 1, is cited as bearing out the contention that the act of the legislature constituted the funds of the dispensary a trust fund and an agreement to receive it as such would make a contract relation that could not be impaired. In that case the State of South Carolina appropriated the assets of the State Bank to the payment of certain of its own obligations and subse-
55 quently repealed this act and those holding the debts referred to claimed the repeal to be a violation of the contract. The State Supreme Court held that the original act was unconstitutional and the plaintiffs therefore took no rights under it and therefore had none impaired by repeal. The Supreme Court of the United States held that if there were a valid law of that kind it would create a trust fund, and if a *cestui que trest* complied with the conditions, his
56 rights would vest and could not be divested by subsequent legislation, but that the original law was void as held by the State Supreme Court and there-

fore no such right had ever vested hence plaintiffs were properly dismissed by the State Supreme Court. It will be seen therefore that the question of a trust did not enter into the case at all, was not necessary to the decision and should not have been considered. The Court then (owing to the vacancy of the Chief Justiceship) was composed of eight members, and three of them dissented from the part of the opinion relied on in the following language: "I cannot 57
regard the eleventh section of the act of the General Assembly of South Carolina, passed December 21, 1865, as amounting either to an assignment or a declaration of a trust of the property of the bank in favor of the holders of the five loan bonds. In my opinion it affected no transfer either legal or equitable and vested no interest in the creditors." This dissenting opinion is by Justice Strong, concurred in by Justices Miller and Davis, who say they all con- 58
cur in the opinion that the creditors had no vested rights, but not in the position that if the act was valid it would give them such rights. So this case is of no practical force.

Messrs. Bernard & Lester (page 15 of brief against certiorari) cite U. S. vs. Peters, 5 Cranch 136, in support of the position that if the mere suggestion of property in the State is made it will not do to stop the investigation there, but the Court has jurisdiction 59
to investigate if the State's title is valid. This is not the case here. Plaintiffs in their bills allege that the State has an interest in the fund and show that the establishment of each claim will either increase or diminish that interest. It is no suggestion. It is an established fact from the pleadings.

The case of U. S. vs. Peters was one where Pennsylvania had had her day in the prize court and lost. The money had been paid to David Rittenhouse 60
who had given a bond to pay it to the State of Penn-

sylvania if ever so adjudged. Pennsylvania having had it once adjudged against her made no such claim for 20 years and the rightful claimants were adjudged to have it in suit against Rittenhouse carrying out the decree of the Court of Appeals of prize cases. The Court says: "The suit was not instituted against the State or its treasurer but against the executors of David Rittenhouse for the pro-
61 ceeds of a vessel condemned in the Court of Admiralty which were admitted to be in their possession." The case is different from this. The Court of Appeals in the early days had decided that the State had no interest and the parties in possession claimed them in their own right. The State had once had its day in Court, hence it could not have asserted a right successfully if present.

They cite also the cases of Louisville & C. R. R.
62 Co. vs. Leston, 2 How, 551, as to the same position. That was a case where the State was a stockholder in a railroad and the suit was contested on the ground that the State was interested. So also was the case of U. S. Bank vs. Planters Bank of Ga., 9 Wheaton. These cases illustrate the meaning of the term used as to "affecting same interest of the State." When the State is a stockholder in a corporation a judgment against the corporation may be taken, although
63 it affects indirectly the interest of the State in reducing its stock value. But it does not *affect directly the State's* pecuniary affairs, it being only indirect and consequential, and that is the class of cases where the State is not necessarily a party. But there is a class where it is necessarily a party and that is where its *pecuniary interest* is *directly affected* by any *judgment* rendered in the cause.

Tindal vs. Wesly, 167 U. S., 220, is also cited. In
64 that case the State sold and conveyed the land in question to Wesly. After the same had been so con-

veyed the Governor decided to attempt to rescind the sale and the Secretary of State Tindal refused to deliver possession.

Action was brought for possession and Tindal claimed to hold for the State. He was a trespasser, and if he had been able to show that the State had title and not Wesly, his justification would have been sufficient under that line of cases where parties sued for acts committed, trespassing on the rights of others and justified under authority of the State or United States. It is held that the plea is good if the authority is lawful, but if it is not lawful it fails. Here Tindal failed to show that South Carolina owned the property, hence his plea failed. The Court says: "And when such officers or agents assert that they are in rightful possession they must make good that assertion when it is made to appear in a suit against them that the legal title and right of possession is in the plaintiff." In that case it was expressly adjudged that it did not affect the right of the State in any respect insomuch as she was not before the Court. The Court says: "It is said the judgment in this case may conclude the State, not so. It is a judgment to the effect only that as between the plaintiff and defendants that the former is entitled to the possession of the property in question; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit the judgment will not conclude it. Not having submitted its rights to the determination of the Court in this case, it will be open to the State to bring any action it sees fit to establish and protect any claim it has to the premises in dispute."

Now, in the case at bar, it is not to dispose of the *possession* of real property leaving the State's interests, which are not dealt with untouched, but it is a pro-

ceeding to disburse funds in which the State is admitted to have an interest, which will be affected by every judgment rendered, directly and pecuniarily, and which is to be paid away finally under the orders in this cause leaving the State no recourse hereafter. If the State is not before the Court, she is not bound and the suit to finally dispose of the fund requires that she be before the Court under Tindal vs. Wesly.

69 They also cite the case of Pennoyer vs. McCannoughy, 140 U. S. 1, to establish their contention that the suit is not one against the State or in which it is a necessary party. That was a case against officers enforcing invalid legislation and attempting to justify under it. The Court says: "It is well settled that no action can be maintained in any Federal Court by the citizens of one of the States against the State, without its consent, even though the sole ob-
70 ject of such suit be to bring the State within the operation of the constitutional provision, which provides that "no State shall pass any law impairing the obligations of contracts," this immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel
71 them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself."

"'In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that differing views have been presented.'

72 "'The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, and thus making it,

though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. *In re Ayers*, 123 U. S., 443; *Louisiana vs. Jumel*, 107 U. S., 711; *Antoni vs. Greenhow*, 107 U. S., 769; *Cunningham vs. Macon and Brunswick Railroad*, 109 U. S., 446; *Hagood vs. Southern*, 117 U. S., 52.'

"'The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and, under the color of an unconstitutional statute, commit acts of wrongs and injury to the right and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State. *Osborn vs. Bank of the United States*, 9 Wheat 738; *Davis vs. Gray*, 16 Wall, 203; *Tomlinson vs. Branch*, 15 Wall., 460; *Litchfield vs. Webster County*, 101 U. S., 773; *Allen vs. Baltimore and Ohio Railroad*, 114 U. S., 311; *Board of Liquidation vs. McComb*, 92 U. S., 531; *Poindexter vs. Greenhow*, 114 U. S., 270.'

The case of Rolston vs. Crittenden, 120 U. S., 390, is cited also. In that case the State of Missouri loaned $3,000,000 of its bonds to the Hannibal & St. Joseph R. R. Co., and in 1865 passed an Act allowing the company to pay back the face of the bonds and the interest on them to date of payment and discharge its liability and get an assignment of the mortgage held by the State on the Railroad.

They waited 16 years after the Act was passed and then paid in the full amount fixed by the statute and on refusal of the officers to assign the lien they brought the action to require it to be done. The court required it to be done. They say that there was much evidence of many transactions between the State officers and the Railroad officers "but we have not deemed it necessary to give either of these
77 matters consideration, because officers of the State could only do what was authorized by the statutes which was enacted for the government of their conduct in the matter, and the rights of the parties depend alone upon the legal effect of those statutes. * * * The State had a right to pass the law and when passed it was binding on those whose duty it was to obey."

The amount was admitted, the law was imperative
78 and the State officers ignoring both were trying to sell the property of the railroad under the lien which under the statute had been paid and only the plain legal duty of assigning the lien and desisting from selling under it remained. The court required the officers to carry out the statute and assign it.

The case, however, is instructive, in that, after the railroad accepted the terms of the Act and arranged to pay the money the Legislature passed an
79 amendatory Act requiring them to pay not only the money and accrued interest but also an amount sufficient to indemnify the State from loss on account of the difference between the rate of interest that the $3,000,000 bore and the rate borne by the bonds of the State that could be retired when the payment was made, and it enforced the difference which was a matter of calculation and amounted to $133,-646.46. The entire matter though was merely one
80 of calculation and construction of statutes and there was no question of there being a *bonafide* contract

with the State or bonafide compliance with the statutes regulating the same and the duty of the officer was without discretion, and it was not committed to him to ascertain how much if any was due or investigate the question whether it was bonafide but the only thing to do was to receive the money under the terms of the Act and make the assignment directed by the Act. The only question was, what does the Act mean? That being settled the duty 81
was purely ministerial.

Finally they fall back on the position that a State loses its immunity from suit by engaging in trade—cite United States Bank vs. Planters Bank of Ga., 9 Wheaton and South Carolina vs. United States. The cases like the bank case were where the State owned part or all the stock in a corporation and the defence was set up that you could not sue the corporation because the State was interested. Very properly the 82
Court held that the corporation was different from the State and the State's stock didn't prevent the suit. That the State's interest was not directly affected by the judgment, but only indirectly so.

The case of South Carolina vs. United States was an action in the Court of Claims to recover the internal revenue tax paid by its agents as wholesale and retail liquor dealers. The expression of the Court 83
that the immunity of the State's agencies *from taxation*, not of the State *from suit*, was a result of the principle that the agencies of government could not be taxed and that this meant the agencies of government as understood when the Constitution was adopted.

The Court says there is no express inhibition against Congress levying a tax on State governmental functions and agencies, but it is from the principle 84
that the power to tax involves the power to destroy and the national government has no power to destroy

the State government and *vice versa*. Hence the power to tax governmental agencies as understood at the adoption of the Constitution is denied, "but when the State engaged in a business which is of a private nature, that business is not withdrawn from the taxing power of the government" for the very good reason that it might work to the same end that the taxation could be made to work towit, destruction of the national government by the State's taking over all forms of business taxed by the national government and cutting off its revenue entirely. The question of the power to tax agencies of the State government by the United States government is no relation within the sixth decree of the right of a non-resident corporation to sue a sovereign State on account of a debt contracted in the exercise of its police powers. The Eleventh Amendment prohibits any suit against a State by individuals but recognizes the difference between the sovereigns and the citizens by permitting sovereigns to sue each other in the United States Supreme Court, and the Supreme Court was dealing with questions between sovereigns when it decided the case above quoted. But there is no doubt that railroad operation and ownership is a form of commerce, and still North Carolina was exempt from suit on account of a debt growing out of construction and control of a railroad by it. Christian vs. A. & N. R. R. Co., 133 U. S., supra, and such were the cases of R. R. Co. vs. Alabama, 101 U. S., 832, and R. R. Co. vs. Tennessee, 101 U. S., 337.

Arkansas engaged in the banking business which surely is commerce. This was held not to give the right of suit and while the right existed at date of contract the legislature repealed the right after suit brought and this was sustained as not impairing the obligations of the contract. See Beers vs. 61, U. S., 527.

There is another position emphasized by the appellees to wit: That the commission is a *trustee* of the fund in their hands and can be litigated with, without the *cestui que* trust being before the Court. There are certain trustees, such as executors, administrators and trustees of express trusts who can sue for the possession of, or be sued for the possession of trust property without joining the *cestius que trust* with them in a certain class of suits and where a trust is created in a party and it is attacked by one interested in defeating, not claiming an interest under it, but claiming in antagonism to it, the trustee represents the entire interest to the extent that he can be sued alone to set the deed aside. But where the suit is to *enforce the trust* and especially where there are antagonistic interests amongst the *cestius que trust* all parties having an interest in the trust fund must be made parties. The rule is well stated in Vetterlein vs. Barnes, 124 U. S., page 172, in the following language:

"The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties so that the Court may finally determine the controversy, and do complete justice by adjudging all the parties involved in it. Story vs. Livingston, 38 U. S., 13 Pet. 359, 375, (10:200, 208); Shields vs. Barrow, 58 U. S. 17 How. 130, 139, (15:158, 160). But in a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, if the trustee has such powers or is under such obligations, with respect to the execution of the trust, that "those for whom he holds will be bound by what is done against him, as well as by what is done by him." In such cases of representation by trustees, the beneficiaries will be bound by the judgment, "unless it is impeached for fraud or collusion between him and the adverse party." Kerrison vs.

Stewart, 93 U. S. 155, 160 (23:843, 845).

In Sears vs. Hardy, 120 Mass. 529, the Court, after observing that who shall be made parties to a suit in equity cannot always be determined by definite rules, but rests to some degree in the discretion of the Court, said: "Generally speaking, however, to a suit against trustees to enforce the execution of a trust, *cestuis que trust, claiming present interests directly op-*
93 *posed to those of the plaintiff, should be made parties, in order that they may have the opportunity themselves to defend their rights, and not be obliged to rely upon the defense made by the trustees, or to resort to a subsequent suit against the trustees or the plaintiff, or to take the risk of being bound by a decree rendered in their absence.*" But the rule is different where the claim of the plaintiff antedates the creation of the trust, and the suit is brought *not in recognition or furtherance of*
94 *the trust, but in hostility to it, as fraudulent and void.* In Rogers vs. Rogers, 3 page, 379, (which was a suit by a judgment creditor to set aside as fraudulent an assignment by the debtor of his personal estate in trust for the payment of a debt to a particular bank, and to pay the residue of the proceeds thereof to other creditors of the assignor) it was objected, at the hearing, that the bank was not made a party defendant. The objection was held to be untenable,
95 the chancellor observing: "As a general rule, the *cestui que trust, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust.* But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same, on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee,
96 who is the holder of the legal estate in the property, without joining the *cestui que trust.*" Wakeman vs. Grover, 4 page, 33; Irwin vs. Keen, 3 Whart. 344, 355; Therasson vs. Hickok, 37 Vt. 464; Hunt vs.

Weiner, 39 Ark. 70; Winslow vs. Minnesota & P. R. Co., 4 Minn. 316; Tucker vs. Zimmerman, 61 Ga. 601."

This rule applies here. If the trust theory is correct, Appellees are claiming under the trust, sueing to enforce it and represent an interest antagonistic to the State which is also a *cestui que trust*, entitled to be heard as to any judgment for Appellees which will affect the amount of its judgment. 97

In answer to the position taken so often by counsel that where it is impossible to make an interested party a party to the suit without ousting the jurisdiction this Court will proceed without such party. We cite Gregory vs. Stetson, 133 U. S., p. 586:

"We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in 98
Story's Eq. Pl., sec. 72: "It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed,) that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between 99
the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly cerain that no injustice is done, either to the parties before it or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not 100
brought out upon the pleadings by the original parties thereto." See also 1 Daniell's Co. Pl. and Pr.

246 et. seq.

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actively or constructively before it. This principle is fundamental.
101 The allegations of the bill show that the contract sued was made and entered into subsequently to the termination of the proceedings before the referee. By the terms of that contract the note in dispute between Mrs. Pike and the complainant was to be held by the bailee, Stetson, "subject to the joint order and direction" of their respective attorneys. It seems too plain to require argument that complainant Gregory, Mrs. Pike, Talbot, Brooks and Stetson
102 all had an interest in the subject matter of the contract—such an interest, too, as brings the case within the rule just announced.

The point was made in the court below, and it is also pressed here, that Mrs. Pike *being a nonsresident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so.* The court below ruled against the complainant on this point,
103 and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, *notwithstanding the Statute referred to and the 47th Equity Rule, a circuit court can make no decree in a suit in the adsence of a party whose rights must necessarily be affected thereby.* Shields vs. Barrow, 58 U. S. 17 How. 130, 141, 142 (15; 158, 162); Coiron vs Millauden, 60 U. S. 16 How. 114, 112 (15; 575), and
104 cases there cited."

We cite also case of California vs. Southern Pa-

cific Railroad Company, 157 U. S., p. 249:

"And Mr. Justice Curtis added: "It remains true notwithstanding the Act of Congress and the 47th Rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot done between the parties to the suit without affecting those rights."

105

Mr. Daniell thus lays down the general rule: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit." 1 Dan. Ch. Pl. and Pr. (4th Am. ed.) 190.

106

Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties or, at least, so far necessary that the canse should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

107

108

We cite also West vs. Randall, 2 Mason's Reports, 181. Printed as a note in the Lawyers' Co-operative Edition of U. S. Supreme Court to the case of Wormley vs. Wormley, 8th Wheat. 451:

"It is a general rule in equity that all persons materially interested, either as plaintiffs or defendants, in the subject matter of the bill, ought to be made parties to the suit, however numerous they may be.
109 The reason is, that the Court may be enabled to make a complete decree between the parties, may prevent future litigation, by taking away the necessity of a multiplicity of suits, and may make it perfectly certain that no injustice shall be done, either to the parties before the Court, or to others who are interested by a decree, that may be grounded upon a partial view only of the real merits."

110 We cite also Mallow vs. Hinde, 12th Wheat., p. 198, which is expressly approved by this Court. Cal. vs. Su. Pac. R. Co., supra.

"In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without
111 directly affecting and prejudicing the rights of others not made parties."

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.

112 "We have no doubt the Circuit Court had jurisdiction between the complainants and the defendant,

Hinde, so far as to entertain the bill, and grant an injuction against the judgments at law, until the matter could be heard in equity."

This case was interpreted and approved in California vs. Sou. Pac. R. R. Co., 157 U. S., 249, in the following language:

"It was held in Mallow vs. Hinde, 25 U. S. 12 Wheat., 193 (6:599), that where an equity cause 113
may be finally decided between the parties litigant without bringing others before the Court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them or if they are citizens of another state; but if the rights of those not before the court *are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the* 114
peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the Court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jusisdiction. *We put it upon the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.*"

115

This certainly fits the case here. The interest of the State in the fund is so "inseparably connected with the claims of the parties litigant that a final decision cannot be made between them without affecting the rights of the absent parties," to wit: the State. Then the State must be here and her presence cannot be dispensed with.

The decisions of this court point unmistakably to the fact thet the State of South Carolina is a neces- 116
sasy party. One set of Appellees counsel avoid it by

saying she cannot be reached by process hence she can be dispensed. This is untenable. The other set say that she is before the court constructively, thus admitting that the court is proceeding in a case against the State which is equally untenable.

She is either before the court court or not before it. If before the court, the jurisdiction is ousted. If not before it, the court cannot proceed for want
117 of a necessary party. The judgment should therefore be reversed.

W. F. Stevenson,
D. S. Matheson,
Attorneys for Appellants in Reply.

118

119

120

FILED.
FEB 18 1909
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, ET AL, *PETITIONERS,*

versus

WILSON DISTILLING COMPANY, ET AL, AND THE FLEISCHMAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.
(21,421).

ARGUMENT ON BEHALF OF THE RESPONDENTS, SUBMITTED BY T. MOULTRIE MORDECAI, FRANK CARTER, SIMEON HYDE, AND H. C. CHEDESTER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, ET AL, *PETITIONERS,*

versus

WILSON DISTILLING COMPANY, ET AL, AND THE FLEISCHMAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(21,421).

ARGUMENT ON BEHALF OF THE RESPONDENTS, SUBMITTED BY T. MOULTRIE MORDECAI, FRANK CARTER, SIMEON HYDE, AND H. C. CHEDESTER.

STATEMENT OF FACTS.

In the year 1892 the General Assembly of South Carolina passed a Statute withdrawing from all its citizens the right to manufacture, sell, or otherwise deal in intoxicating liquors of all kinds, and undertook the conduct and management of the business itself, under a system known as the "State Dispensary." (Page 331, Transcript of Record.)

By that Act, a Board of Control was established, consisting of the Governor, the Comptroller General and the Attorney General. To this Board was committed the duty and

upon it was placed the responsibility of the conduct and management of the liquor business in South Carolina.

It is not necessary to recite this Act more fully. The purpose in referring to it is simply to state the composition of the Board which, at that time, was vested with the powers mentioned.

(Vol. 21, Statutes, page 62.)

It may be of importance to mention here that in the inception of this system the sum of fifty thousand dollars was appropriated by the State to constitute the first capital of the Institution, which amount has long since been repaid to the State, and no further appropriation has at any time since been made. (Page 332, Transcript.)

In the year 1896, Vol. 22, page 124, the constitution of the State Board of Control was changed so that it would consist thereafter of five members, to be elected by the General Assembly; each of these members was required to give a bond of ten thousand dollars, and the entire liquor business was to be conducted and controlled by them. (See Transcript, page 332.)

They were to furnish liquors for sale to the County Dispensers, who were to remit the net proceeds of such sale to the State Treasurer. The bills for the purchases of liquor were to be paid by the State Treasurer, upon warrants drawn by the Commissioner, who was to be elected by the State Board of Control. (Same page of Transcript.)

So the law stood until 1907 and it will readily be seen that the tendency was steadily towards the surrender on the part of the State of the management of the business and control of the affairs of the State Dispensary.

In that year, 1907 (see pages 89 and 333), the General Assembly passed a Statute entitled "An Act to Declare the Law in reference to and to regulate the Manufacture, Sale, Use, Consumption, Possession, Transportation and Disposition of Alcoholic Liquors and Beverages within the State and to Police the same." By the 47th Section of this Statute "the State Dispensary is hereby Abolished," and "all Acts and parts of Acts inconsistent with this Act are hereby repealed."

Taking this section in connection with the history of the Dispensary Law and the management of the dispensary as hereinbefore stated, it appears that it was the legislative purpose and intention to sever the State Dispensary from the State and to be done with it.

Possibly some history of the Dispensary and an investigation of its affairs and the scandals to which it had given rise, and the alleged corruption of which it had been the center, supplied the reason for this legislative action, and it is written in the statutes of the States and the proceedings before this Court that the State had reached a point when its connection with the State Dispensary, as such, was to cease and determine.

The statute last cited was approved on the 16th day of February, 1907, (pages 89 and 322). At the same session of the Legislature by an Act approved on the same day, entitled "An Act to provide for the Disposition of all Property connected with the State Dispensary and to wind up its affairs," (pages 89 and 332), a commission was created, to consist of five members and to be appointed by the Governor, to be known as The State Dispensary Commission.

Each of the members was required to give bond in the sum of $10,000. After providing how the commission should organize it is given authority, and it is made its duty, "to close out the entire business and property of the State Dispensary except real estate, and out of the proceeds of such sales and from the collection of debts due the dispensary the commissioners are to pay all just liabilities at the earliest date practicable, and shall have the power to make such disposition of the stock on hand as their judgment may dictate," with certain other provisions which it is not necessary to recite.

Realizing that after the payment of the debts of the institution there would probably be a balance remaining in the State Treasury, the result of the remittances made by the county dispensaries under the former law, it is provided in Section 5, of this last named Act, "the said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act,

all surplus funds on hand after paying all liabilities."

The commission proceeded to sell all of the property except the real estate and to collect all assets due the State Dispensary, but having failed to pay out of the proceeds of such sales and collections the debts due to the complainants and others, these proceedings were filed.

A brief statement of the pleadings is necessary. (Pages 2-17 and 245, Transcript.)

In the Wilson proceeding, after the formal allegations and the allegation of the indebtedness, by reason of sales made to the State Dispensary (see folios 2-6 of the record) it is alleged, in the language of the Statute last referred to, that "it was the duty of the commission to close out the entire business and property," etc., and "to pay all the just liabilities of the Dispensary." A further allegation is that the commission had realized upon these assets, but had failed and refused to pay complainant's debt, alleging that the assets were not sufficient to pay all of the debts of the Dispensary, and it is particularly alleged that the Commission proposes and will, unless restrained by order of the Court, put the funds in their hands into the State Treasury, thus depriving the complainants of their rights in the premises.

The answer to this complaint, after denying the allegations last above referred to, raised the questions that the commission constituted a court, and that this court is without jurisdiction to control or restrain their action, and also that they, the commission, are officers of the State and that this action is to all intents and purposes a suit against the State, and that the State is an indispensable party.

The complaint in the Fleischman case alleged at greater length practically the same conditions as in the Wilson case. It is not necessary to abstract them, further than to say that reliance is placed upon the same Section of the Winding Up Statute as is referred to in the Wilson case.

The answer in the Fleischman case, so far as the present hearing is concerned, raises the same questions, but with more particularly as to the position taken that the com-

mission constituted a court in that it is alleged at folio 68, that "to restrain the action of the commission by the issuance of the injunction prayed for, would be in violation of Section 720 of the Revised Statutes of the United States."

The Circuit Judge issued a temporary injunction and rule to show cause, which was made permanent by his decree, dated March 3, 1908 (see Record, folios 33, 143, 243, 301, et seq).

The Legislature of South Carolina, on February 24, 1908, passed an Act directing the State Dispensary Commissioners to pay out of any funds in its hands from the profit or business of the State Dispensary, fifteen thousand dollars ($15,000.00), into the State Treasury, to be used for the purposes mentioned in the Act. The commissioners having refused to pay this amount because of the Restraining Order issued in this proceeding by Judge Pritchard, on March 4, 1908, a proceeding was instituted in the Supreme Court of South Carolina by the Attorney General of the State, seeking to compel the payment of this money by mandamus directed to the commissioners. The commissioners showed for cause why the writ should not issue, the pendency of this proceeding in the Circuit Court, and that they were restrained by the order therein from paying out the funds, attaching to their answer a copy of the Bills and of the Restraining Order.

Thereupon the Supreme Court of South Carolina, upon the coming in of the Return and after argument, held that the suits in the Circuit Court were suits against the State and that the State was an indispensable and necessary party and the Act of February 16, 1907, set out in the petitioner's brief, did not create a trust and that the funds in the custody of the Commissioners were the property of the State, and in the hands of the commissioners as the agents of the State, and subject to legislative control under appropriation, and that the order of the Circuit Court in these proceedings was void, as the Court was without jurisdiction in the premises and that there was no reason why the mandamus should not issue. (See pages 280, et seq.)

Upon appeal to the Circuit Court of Appeals for the

Fourth Circuit, from the order of injunction, and appointing receivers, granted by the Circuit Judge as above stated, and after hearing full argument, that Court sustained the judgment of the Circuit Court and remanded the case for further proceedings in accordance with the views therein expressed. (Folios 331, et seq.)

The points decided were:

First: That the suits in the Circuit Court were not suits against the State.

Second: That the State was not an indispensable party.

Third: That the Winding-up Commission created by the Act of 1907 did not constitute a court, and the Court held, therefore, that the Decree of the Circuit Court appealed from should be affirmed and the case remanded for such further proceedings as might be in accordance with the terms expressed in the opinion.

Thereafter, by orders of the Presiding Judge of the Circuit Court of Appeals (see pages 375-376 of the record), the mandate in this cause was stayed so that the matter might be brought before this Court on certiorari. Petition for certiorari was subsequently filed and the Court having granted the same, the record has now been certified to this Court.

The errors assigned in the petition for certiorari, found at pages 11 and 12 of the petition, are as follows:

1. In holding that the suits were not suits against the State in violation of the provisions of the Eleventh Amendment to the Constitution.

2. In holding that the State was not a necessary and an indispensable party to said suits.

3. In holding that the Circuit Court had jurisdiction of said causes.

4. In holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

5. In not holding that there was no equity in said bills, and no cause or necessity shown for the grant of an injunction or the appointment of receivers.

6. In not reversing the order and decree granting an injunction and appointing receivers.

7. In not directing a dismissal of the bills and each of them.

ARGUMENT.

FIRST.

These are not suits against the State.

The first question to be discussed is as follows: Did the Circuit Court of Appeals err in holding that the suits were not suits against the State and within the provisions of the 11th amendment to the Constitution?

Upon this proposition we submit the following discussion with the authorities applicable thereto:

In this connection it is proper to remark, first, that the attempt is not made here in any way to frustrate the purpose of the State in passing the legislation under discussion, nor to force the officers in charge of the fund, whatever may be their relation to the State, to do any act not contemplated by the Statutes. The decisions cited in support of the conflicting view upon the question now being discussed, while apparently opposed, are easily reconcilable when it is remembered that in one class of cases the effort was made to force certain officers to do what they were commanded by Statute not to do, and in the other class of cases the purpose was to have carried out, through the agencies therein provided, that which the Statute enjoined and required.

It is to this latter class of cases that the proceedings, now before this Court, belong and this position is fully justified by an examination of the pleadings in the case.

After reciting the provisions of the Statute and the debts incurred and the failure to pay the debts the complaints in both cases allege that the debt is justly due, and in the Fleischman case the allegation is made at length, and with

great particularity, that the claim has been passed upon by the commission, that the amounts allowed are practically correct, and that notwithstanding this ascertainment as to the justness of the claim and the validity of the obligation, the defendants refuse to pay it.

In other words, if there be any duty imposed upon the commission of a quasi judicial nature, involving any discretion, they have already exercised it, and to that extent, that is to the extent of its duty to the State, has performed it, and the only other duty remaining undone is the duty to the complainants and it is to enforce the performance of that duty to the complainants, the State thus being out of the question, the duty to it having been performed, that these proceedings are brought. Such being the case, the authorities to which we shall hereafter refer, and which are referred to fully in the decision by the Supreme Court of South Carolina, and the Circuit Court of Appeals, and which need not all be referred to here, apply, to the effect that the State is not an indispensable party in such a proceeding, and that the Court has jurisdiction to proceed without it.

The two cases most often cited in support of the several positions taken by the respective parties, are *Louisiana v. Jumel*, 107 U. S., 711, *and Rolston v. Missouri*, 120 U. S., 390.

The decision in the Jumel case was based upon the fact that an ordinance forbade the payment of certain interest and withdrew from the officers of the State the means of carrying her contract into effect, and that the execution of the contract can not be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against the officers who are merely obeying the positive orders of the supreme political power of the State.

On the other hand, in the Rolston case, the Court said:

> "The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made the trustees are entitled to

their decree; if it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the Court and the suit is in equity, it may be restrained so as to determine what the trustees must do in order to fulfil the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for."

The same principle is laid down in many other cases cited in the decree below.

First of all, the case of *Osborne against the United States Bank*, 9 *Wheaton*, 739. In that case the suit was against the officer and was sustained for the very reason that the State could not be made a party under the Eleventh Amendment.

Here the subject matter was notes and money wrongfully withheld, and it was held that the prohibition of the Eleventh Amendment does not extend to cases where the State is not a party on the record, though it may have an ultimate interest in the subject matter.

Referring again to the issues raised in these proceedings and the condition in which the matter is before the Court, so that with reference to these claims there is no exercise of discretion required on the part of defendant, we cite the "*Board of Liquidation against McComb*," 92 U. S., 531, where it was held that, "although a State without its consent can not be sued by an individual; nor can a Court substitute its own discretion for that of the executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed, and the performance is refused, any person who will sustain injury by such refusal, may have a *mandamus* to compel its performance."

Again, it must be distinctly borne in mind throughout this discussion that the purpose of both proceedings now before the Court was principally to prevent the distribution of the funds without discharging the plain obligation to the plaintiffs, due them from the commission, and this was not seeking to defeat the purpose of the statutes, but rather to carry out that purpose fully and expeditiously and fairly.

Pennoyer against McConnaughy, 140 U. S., 1: In this case the plaintiff had certain contract rights from the State which were threatened to be invaded by the Land Commissioner, an officer of the State, having in charge all land interests of the State, under an Act which was claimed to be unconstitutional, and the question was raised that the suit was really against the State although nominally against the land agent, and the Court held that it was not; but that it might proceed against the Land Commissioner.

In the opinion Mr. Justice Lamar divides the cases in which this question has arisen into two classes, the first of which, "is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts," and the other class "is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under contract with the State."

> "Such suit, whether brought to recover money or property in the hands of such defendant, unlawfully taken by them in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State."

Citing *Osborne vs. the Bank*, 9 *Wheaton*, 738; *Davis vs. Gray*, 16 *Wallace*, 203; *Tomlinson vs. Branch*, 15 *Wallace*, 460; *Litchfield vs. Webster County*, 101 U. S., 773; *Allen vs. Baltimore, etc., R. R.*, 114 *U. S.*, 311; *Board Liquidation vs. McComb*, 92 *U. S.*, 531; *Poindexter vs. Greenhow*, 114 U. S., 270.

Many of these authorities are cited in the later cases and are also cited in the opinion of the Supreme Court of South Carolina, and of the Circuit Judge, and the principle runs all through them, that where the purpose of the proceeding runs

along with the purpose of the State (as shown in its legislation), mandamus, or injunction, as the case may be, will lie to enforce a right or prevent a wrong, and that such proceeding will lie against the officer whose duty it is, under a statute, to do the thing required, or not to do the thing sought to be enjoined.

It will serve no good purpose to prolong the discussion quoting at length all of these authorities, familiar to the Court, and recently made very familiar to counsel by reason of the repeated discussion of these questions, and we shall refer only to a few more.

The case of *Tindall v. Wesley, in* 167 U. S., quoted in the opinion below, is precisely in point, even taking in view that the property in question in this case is the property of the State, strictly speaking.

Wesley, the plaintiff, claimed to be the owner of certain real estate in the city of Columbia, which was also claimed by South Carolina as its property, and was in the custody of the Secretary of State of South Carolina, who, by law, is the custodian of all State property.

The actual possession of the real estate in question was in another who was simply a watchman under the Secretary of State. Both defendants disclaimed any personal interest in the property, and averred that the title and right of possession were in the State. In that case the question was distinctly raised that the suit was against the State within the meaning of the Eleventh Amendment; and it was held that it was not a suit against the State, but simply an action to recover against those who were in possession of the property; and it was held that the Eleventh Amendment gave no immunity to officers or agents of States, in withholding the property of a citizen without authority of law, and when such officers or agents assert that they are in rightful possession, they must make that assertion good upon it appearing, in a suit against them as individuals, that the legal title and right of possession are in the plaintiff.

In this case special reference is made to the case of *United States v. Lee*, 106 U. S., 218, and it is stated that the same principles apply as are enforced in cases in which the United States is a party.

In the latter case the doctrine that, except where Congress has provided, the United States cannot be sued, was reaffirmed, but it is held that it had no application to officers and agents of the United States, who, as such, holding for public uses possession of property, are sued therefor by a person claiming to be the owner thereof, or entitled thereto; but the lawfulness of that possession, and the right or title of the United States to the property, may, by a Court of competent jurisdiction, be the subject matter of inquiry, and be adjudicated accordingly.

Here, again, many authorities are cited in support of the decision, and the same distinction clearly drawn.

Bearing in mind that the position we take is that these proceedings seek to require the performance of statutory duties enjoined upon the commission, by injunction, that the fund may be kept intact for the purpose of carrying out the statute, the case last cited is very strong.

Said the Court:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of citizens, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, *to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.* The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties

setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion."

And because it contains a history of the judicial interpretation and application of the Eleventh Amendment we refer particularly and at length, for facility of reference to the many authorities therein cited, to the following very recent case:

In the Matter of Edward T. Young, Petitioner on Petition for Writ of Habeas Corpus and Certiorari.

(*Decided March 23, 1908.*)

In that case the State of Minnesota had passed a law imposing penalties upon railroad corporations and officers for violating certain freight rates, so severe that the Court declared the regulations violative of the provisions of the Constitution of the United States, guaranteeing the equal protection of the laws. Pending the proceedings, a temporary injunction was served upon certain officers of the State, restraining them from attempting to enforce the law in question. This temporary injunction was served upon the attorney general of the State, among others, and he appeared specially to move to set it aside, upon the ground that the Court had no jurisdiction over him as attorney general, and that the suit was in reality against the State of Minnesota, which had not given its consent to such proceeding, and that, therefore, the Court was without jurisdiction.

The attorney general also demurred to the bill on the same grounds. The Court overruled the motion and demurrer, and subquently granted a preliminary injunction. The attorney general, notwithstanding the injunction, proceeded to enforce the law, and was fined for a contempt.

The matter then came before the Supreme Court of the United States on an application for habeas corpus and writ of *certiorari*.

Mr. Justice Peckham delivered the opinion of the Court and

reviewed all the authorities on the questions, whether this was a proceeding against the State prohibited by the Eleventh Amendment.

The petitions were dismissed—the Court holding, among other things, as follows:

> "The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hens v. Louisiana*, 134 *U. S.*, 1. It was adopted after the decision of this Court in *Chisolm v. Georgia*, 2 *Dall.*, 419 (A. D. 1793), where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this Court involving the Eleventh Amendment among them being *Osborne v. United States Bank*, 9 *Wheat.*, 738, 846, 857 (A. D. 1824), which held that the Amendment applied only to those suits in which the State was a party on the record.
>
> "In the subsequent case of *Governor of Georgia v. Madrazo*, 1 *Pet.*, 110, 122, 123 (A. D. 1828), that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the Court, while citing *Osborne v. United States Bank*, *supra*, said that where the claim was made, as in the case then before the Court, against the Governor of Georgia as Governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State, and for slaves in

possession of the State government), the State might be considered as a party on the record (p. 123), and therefore the suit could not be maintained.

"*Davis v. Gray*, 16 *Wall.*, 203, 220, reiterates the rule of *Osborne v. United States Bank*, so far as concerns the right to enjoin a State officer from executing a State law in conflict with the Constitution or a Statute of the United States, when such execution will violate the rights of the complainant.

"In *Virginia Coupon Cases*, 114 U. S., 270, 296, (Poindexter v. Greenhow), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a tax payer for non-payment of his taxes, was a suit against him personally as a wrongdoer, and not against the State.

"'*Hagood v. Southern*, 117 U. S., 52-67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and although the State was not in name made a party defendant, yet, being the actual party to the alleged contract, the performance of which was sought, and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.'

"The cases upon the subject were reviewed, and it was held, *in re Ayers*, 123 U. S., 443, that a bill in equty brought against officers of a State, who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State, of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood v. Southern*, *supra*.

"A suit of such nature was simply an attempt to make the State itself, through its officers, perform its alleged

contract, by directing those officers to do acts which constitute such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

"On the other hand, *United States v. Lee*, 106 U. S., 196, determined that an individual in possession of real estate under the government of the United States, which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See, also *Tindal v. Wesley*, 167 U. S., 204, to the same effect.

"In *Pennoyer v. McConnaughy*, 140 U. S., 1, 9, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainant's contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborne v. United States Bank, supra*, was cited, and it was stated: 'But the general doctrine of Osborne v. Bank of the United States, that the Circuit Courts of the United States will restrain a State officer from executing an unconstitutional Statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.' The same principle is decided in *Scott v. Donald*, 165 U. S., 58-67. And see *Missouri, etc., v. Missouri Railroad Commissioners*, 183 U. S., 53.

"The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayers* case, 123 U. S. (supra), was to restrain the State officers from commencing suits under the act of May 12,

1887 (alleged to be unconstitutional), in the name of the State, and brought to *recover taxes for its use*, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself would not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the Court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

"Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass, such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas), and the Attorney General, all of whom were held suable, and that such suit was not one against the State. The commission was enjoined from enforcing the rates it had established under the act, and the Attorney General was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the commission under such act. It is true the statute in that case, creating the board, provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a Court of competent jurisdiction in Travis County, Texas, against the commission as defendant. This Court held that such language permitted a suit in the United States Circuit Court for Western District of Texas, which embraced Travis County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the Attorney General was enjoined), and, therefore, not prohibited under the amendment. It was said, in the opinion, which was delivered by Mr. Justice

Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the Court was that the objection to the jurisdiction of the Circuit Court was not tenable whether that jurisdiction was rested (page 393), 'upon the provisions of the Statute, or upon the general jurisdiction of the Court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States.' Each of these grounds is effective, and both are of equal force. *Union Pacific, etc., v. Mason Company*, 199 U. S., 163-166.

"In *Smyth v. Ames*, 169 U. S., 466 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them as officers of the State from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the State, it was said: 'It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rate being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment."

"There was no special provision in the statute as to rates, making it the duty of the Attorney General to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. *State of Nebraska ex rel., etc., v. The Fremont, etc., Railroad Co., 22 Neb.*, 313.

"The final decree enjoined the Attorney General from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of en-

forcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this Court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual State officers for the purpose of enjoining the mfrom enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

"This decision was reaffirmed in Prout v. Starr, 188 U. S., 537, 542.

"Attention is also directed to the case of *Missouri, etc., Ry. Co. v. Missouri R. R., etc., Commissioners*, 283 U. S., 53. That was a suit brought in a State Court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against the railroad company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri river. The defendant sought to remove the case to the Federal Court, which the plaintiffs resisted, and the State Court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this Court held that the State was not the real party plaintiff, and the case had, therefore, been properly removed from the State Court, whose judgment was thereupon reversed.

"Applying the same principles of construction to the removal Act which had been applied to the Eleventh Amendment, it was said by this Court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

"Although the case is one arising under the removal act and does not involve the Eleventh Amendment, it, nevertheless, illustrates the question now before us, and

reiterates the doctrine that the State is not a party to a suit simply because the State railroad commission is such party.

"The doctrine of *Smyth v. Ames* is also referred to and reiterated in *Gunter, Attorney General, v. Atlantic, etc., Railroad Co.*, 200 U. S., 273, 283. See also *McNeill v. Southern Railway*, 202 U. S., 443, 539; *Mississippi Railroad Commission v. Illinois, etc., Railroad Co.*, 203 U. S., 335, 340.

"The authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

THE STATE COURT DECISION.

(See page 280 of Transcript.)

As incidental to this question, we take up now the discussion of the question whether the United States Courts are bound in this proceeding to follow the decision of the State Supreme Court rendered in a case instituted after this proceeding was begun, and after the questions involved had been passed upon by the United States Circuit Court in such proceeding.

In considering this question when presented to him, Judge Pritchard, at page 299 of the record, held as follows:

> "The Court having considered the opinion of the Supreme Court of South Carolina, which holds that this is a suit against the State, and therefore inhibited by the Eleventh Amendment, is of the opinion that this Court is not bound by the principles enunciated therein, inasmuch as it was rendered subsequent to the decision of this Court, and necessarily involves a construction of

the Constitution of the United States," and this position was fully sustained by the Circuit Court of Appeals. (Page 372 of Transcript.)

In this connection we submit, in addition to this, that the present controversy also involves the construction, or at least the determination of the question as to what constitutes a Court under Section 720 of the Revised Statutes of the United States, so that there are practically two Federal questions involved, besides the construction of the State statute.

The Circuit Judge relied upon two leading authorities, one of which is *Burgess against Seligman*, 107 U. S., page 33, from which he quotes as follows:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the Statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts are co-ordinate with, and not subordinate to, the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the Statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal Court was to wait for the State Courts to de-

> cide the merits of the controversy, and then simply register their decision; or that the judgment of the Circuit Court should be reversed, merely because the State Court has since adopted a different view."

And also the case *of Pease against Peck*, 18 Rwy., 599, where the Court says:

> "When the decisions of the State Court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a State Court for the very purpose of anticipating our decision of a question known to be pending in this Court. Nor do we feel bound in any case in which a point is first raised in the Courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of the State."

The case in 107 U. S. has been followed by a very large number of cases, both in the Circuit Courts and the Supreme Court, and some of the latter decisions will be referred to.

In *Louisville & Nashville R. R. Co. against Palmes*, 109 U. S., p. 244, it was held that the Federal question before the Court is whether the State Court gave effect to a State law which impairs the obligations of a contract; in deciding which, and in determining whether there was a contract, the Court is not necessarily governed by previous decisions of State Courts except where they have been so firmly established as to constitute a rule of property.

Said the Court (page 257):

"It is undoubtedly true that the opinion of the Supreme Court of Florida, in the case of Gonzales v. Sullivan, 16 Fla., 791, is not consistent with that which we have expressed upon some of the principal questions involved in this case. It did declare, speaking of the effect of the Internal Improvement Act of 1855, 'that an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the road itself, and not to the companies,' and that by the act of 1872 the Pensacola and Louisville Railroad Company, as assignee of the Florida and Alabama Railroad, became entitled to the exemption, because 'the property passed, and with it, as an incident, went the exemption.'"

In *Buncombe County against Tommey*, 115 U. S., 122, the question arose as to whether a mechanic's lien could be enforced upon railroad property under the Statute law of North Carolina. While the particular Statute had never been finally construed by the Supreme Court of North Carolina, nevertheless, that Court had given construction to it to the extent of a very clear intimation of an opinion, and the Supreme Court said:

"But without accepting as conclusive an opinion delivered after the rights of the parties had become fixed, (*citing Burgess against Seligman, supra*), 'we rest our interpretation of the Statute upon the ground that it has no reference to the work done or materials furnished in the construction of railroads.'"

In another case in the same volume, 115 U. S., *Gibson vs. Lyon, at page* 439, the Court says:

"As a precedent the decision of the Supreme Court of the State, though single, is entitled to peculiar respect because of the questions decided arising upon the local law of the State, but it cannot have conclusive force in the Courts of the United States unless it has become a rule of property."

In Carroll County against Smith, 111 U. S., 557, it was held that: "the decision of the highest Court of a State construing the State's Constitution is not binding upon this Court, as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this Court, and when the rights which it affects here were acquired before it was made."

Said the Court:

> "The decision, in *Hawkins v. Carroll County*, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, *pronounced after the controversy arose*, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those Courts to determine for themselves what is the law of the State by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. *Burgess v. Seligman*, 107 U. S., 20, 30."

In Anderson against Santa Anna, 110 U. S., 356, the question arose upon the construction of the laws under which municipal corporations in a State were allowed to incur indebtedness, and it was held "that where bonds were issued under the laws which had not at the time of issue been construed by the highest Court of the State, its subsequent con-

struction by them is not conclusive on Federal Courts, though they will lean to an agreement of views with the State Court."

In this case the decision in the Burgess case, in 107 U. S., was referred to as having summed up all of the authorities up to that time and laid down the rule thus adopted in this case, that the United States Courts will not necessarily follow the decisions of State Courts made after the time of the transaction which is the subject of litigations.

In *Bolles v. Brimfield*, 120 U. S., 759, citing *Anderson v. Santa Anna, supra*, the Court says it adheres to the rule upon the subject of following judgments of State Courts, with the qualification, however, that such doctrines may be announced by the State Court before the rights which are the subject of litigation in the Federal Court accrue.

In *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555, the question arose upon a Statute of the State of Massachusetts providing that a person engaged in traveling on the Sabbath day could not recover against a corporation upon whose road he travels, for personal injury, which had been sustained by the decisions of Massachusetts in a large number of cases which were of sufficiently long standing to establish a rule, so far as they can establish it, and the Supreme Court followed the rule simply for those reasons, and even in this case there was a dissent by Mr. Justice Harlan, in which Mr. Justice Field concurred.

In *German Savings Bank against Franklin County*, 128 U. S., 526, the State law made a certain provision with reference to municipal bonds issued by a county, and the State Courts had construed the law. In passing upon the question, whether the Supreme Court should follow these decisions, the Court says:

> "This interpretation of Section 7, of the Act of April 16th, 1867, accompanied all bonds subsequently issued, into the hands of whoever took them, whether a *bona fide* holder or not, and this Court must recognize this decision of the Supreme Court of Illinois as an authoritative construction of the Statute made *before* the bonds were issued, and to be followed by this Court." Citing

a number of cases in which that principle was sustained.

Thus the principle is again emphasized that where the State law has been construed *before* the transaction occurs, and the parties have acted upon the faith of that decision, then the Supreme Court of the United States will not disturb that construction.

In considering the effect of a construction of a devise, the Supreme Court, in Barker vs. Pittsburg, etc., R. R. Co., 166 U. S., page 83, says:

> "It becomes important, therefore, that the opinion of the Supreme Court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that Court."

The rule, with reference to following the State Court when its decisions upon a point are numerous and settled, and a rule of property is concerned, is again considered in *Wade v. Travis Co.*, 174 U. S., 499, and to illustrate how faithfully the Supreme Court has adhered to the rule laid down in 107th U. S., and other cases, while a single decision made, *after* a transaction will not always be followed, the rule is applied in a reversed state of the facts, in this, that having followed the Supreme Court of Illinois (20 Howard, 1), in a line of decisions which settled a rule of property, the Supreme Court adhered to that rule, although the Supreme Court of the State had subsequently overruled its own decision, and had given the Act of the Legislature a different construction.

In a very full discussion of the rule in *Warburton v. White*, 176 U. S., 495, the result deduced is that there is no absolutely fixed rule which requires the Supreme Court of the United States to follow the decision of the State Court in considering a State Statute.

It was said that if the acts done were done in pursuance of the construction by the State Court, and such construction had become a fixed rule of action or of property, the United States Court would follow it; but if not, the United States Court would not be relieved of the responsibility of putting its own interpretation upon the Statute.

In *Flanigan v. Sierra County*, 196 U. S., 553, it was held: Whether a Statute of a State is, or is not, a revenue measure, and how rights thereunder are affected by a repealing Statute, depends upon the construction of the Statutes, and where no Federal question exists this Court will lean to an agreement with the State Court.

In that case there was a conflict between the Supreme Court of California and the Circuit Court of Appeals, and the contention was that the conflict did not arise out of the construction of the Statute of the State, but as to the effect of the new Statute, considered by each Court to be a repeal of a prior Statute, upon the rights of the litigants granted under a prior Statute.

The Circuit Court of Appeals first assumed, but did not decide, that the Ordinance may have been a revenue measure, and the Supreme Court of California decided that the Ordinance was a revenue measure.

It was contended that this question did not involve the construction of the Statute; but was merely the determination of a question that depended upon a principle of general law and not upon a positive Statute of the State. This being the contention of counsel, it was further said that: "In such case the Courts of the United States are not required to follow the decision of the State Courts.

The Court declined to adopt this view, and went on to say:

> "If, in any case, we should lean to an agreement with the State Court, this is such a case. There is no Federal right involved. The question is one strictly of the State law, and the power of one of the municipalities of the State under that law. If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it."

So that even in that case the Court decided that it was not bound to follow the decision of the State Court.

Finally, as showing the attitude of the Supreme Court to

this question, we cite *Yazoo & Miss. Valley R. R. vs. Adams*, 181 U. S., 580.

In that case the question arose upon the construction of the State Statute with reference to the collection of taxes, and that the Supreme Court of Mississippi having decided that all the taxes had accrued after the consolidation of certain roads, and the company had thereby lost its exemption, and as this was the construction of the general tax laws of the State which were complex and difficult of interpretation, this Court would accept that construction and deny the petition for a rehearing.

This is very far from holding that the Court will, in all cases, adopt the construction of the State Statute by the Supreme Court of the State; and in delivering the opinion of the Court Mr. Justice Brown said:

> "Assuming that we may exercise an independent judgment respecting their (Statutes) construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one or not. The right asserted depends upon comparison and construction of such Statutes; and the settled rule of this Court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the State Statute which has been adopted by the Court of last resort in that State."
>
> Putting this last rule in comparison with the decisions in the Burgess case, *supra*, and other decisions which we have cited, it would seem that there would be no reason why the decision of the State Court should be followed, where it has been made not only after the rights have accrued, which are the subject of litigation, but also after a contrary interpretation by the Courts of the United States."

SECOND.

The State not a necessary or indispensable party.

The second question submitted in the petition is whether the Circuit Court erred in holding that the State was not a necessary and an indispensable party to said suits.

It is first necessary to enquire what, under the Statute, is the interest of the State in the fund in question.

Under the Act of February 17th, 1907, Section 5, the State reserves, or rather derives, its interest in this fund, as the same is in the hands of the defendants, from the following provision: "Said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand, after paying all liabilities."

It is admitted that the entire liability of the State Dispensary was about six hundred thousand dollars, and that the funds in the hands of the Commissioners amount to about eight hundred thousand dollars. (Pages 48, 49, 50, of Transcript.) It also appears that the fifty thousand dollars originally loaned by the State to the State Dispensary, with which to begin business, has been repaid (Page 332), and that the sum of one hundred and twenty thousand dollars, or thereabouts (page 335), which was in the State Treasury previous to the Act establishing this winding-up commission, was paid to the commission by the State Treasurer.

The language in Section 5, *supra*, is "all surplus" funds on hand, after "paying all liabilities," and as these liabilities could be decreased, the interest of the State would be increased, but to hold that the State was a necessary party because of this condition of affairs would be to hold that the Legislature passed the Act in question with a view not to deal promptly and fairly with the creditors of the Dispensary, but to save as much as possible out of the fund for the State, regardless of its just indebtedness—which cannot be true.

Again, can the Court proceed to final judgment in this case without the State before it as a party? What has it to do? It has to ascertain through its own machinery or through the commission what are just liabilities of the Dispensary. Nothing more, nothing less, and the result or balance, "all surplus funds" after such liabilities are paid, shall belong to the State.

It is clearly a condition in which the State, if it desires to see that this investigation is fairly made, so that it shall

get the most possible out of the fund, should come into the case and be made a party. The State has parted with the entire fund by a declaration of trust executed by Statute to the commissioners. Its interest is purely reversionary, the title being in the commissioners in trust. This is shown by the fact before referred to that the treasurer actually paid to the commission the balance of one hundred and twenty thousand dollars, in his hands at the time of the adoption of the Act. (Page 335.)

Now, then, such being the facts and the reasonable deduction from them, and the state of the case, we refer to the case of *Cunningham against Maine and Brunswick Railroad*, 109 U. S., 446. The chief principle laid down is "that whenever it is clearly seen that a State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

We observe that there is a total absence in this case of the elements so held to be essential in this decision.

There is no reason whatever why the Court cannot call in all of its creditors, scale their claims, pay what is just, or require the commission so to do, thus enforcing and not denying the terms of the Statute, and leave the balance in the hands of the commission for the appropriation of the same under the terms of the Statute.

The facts upon which the case of *Cunningham* is based are these:

The State had endorsed railroad bonds, taking a lien upon the property as security, and the company failed to pay interest upon the endorsed bonds, whereupon the Governor of the State took possession and put the property in the hands of a receiver, who sold it to the State. The State thus became the actual owner of the property. The State took possession and took up the endorsed bonds, substituting the bonds of the State in their place. The holders of an issue of mortgage bonds issued by the railroad company, subsequently to those endorsed by the State, but before the default in payment of the interest filed a Bill in Equity to foreclose their own mortgage, and set aside the sale, and to be let in as prior in lien.

and for other relief affecting the property—setting forth the above facts; and made the Governor and Treasurer of the State parties.

These officers demurred, and it was held that the facts in the bill showed that the State "is so interested in the property that final relief cannot be granted without making it a party, and the Court is without jurisdiction."

Now, in this case the facts are wholly different, because in the case cited the absolute title to the property was in the State, and an effort was made to foreclose a prior lien. How could the title of the State be divested in a proceeding to which the State was not a party? else the railroad property would have to be sold subject to the title of the State.

In the present case the State has voluntarily declared a trust by the Act of 1907, primarily in favor of the creditors, reserving to itself only such amount as should remain after the creditors have been fully satisfied. The title is by the act of the State transferred to the trustees, and the title can therefore be taken out of these commissioners as trustees in a proceeding to which they are parties, whether the State be a party or not, and if this be so then the Court can administer the fund to the extent, at least, of preventing its waste, and in preserving it for ultimate disposition, according to the terms of the Statute. That is what this proceeding seeks to do.

The payment of the complainant's claims, of course, would follow, but the present purpose is to keep the fund intact until all claims can be called in, and the rights of the State are in no way affected by such proceeding; and if the other view prevail, that these claims have been adjusted and ought to be paid, then the State could not, if it were in the case, say anything against that position, because it was to effect that very result that the Statute was enacted.

Barney against Baltimore City, 6 Wallace, 280, is much relied on to maintain the position that the State is an indispensable party, but the facts in that case are widely different from those in the case at bar.

It was there held, as stated in the syllabus, that particular owners or tenants in common in real estate, of which parti-

tion is asked in equity, have an interest in the subject matter of the suit and in the relief sought, so intimately connected with that of their co-tenants, that if these cannot be subjected to the jurisdiction of the Court the bill will be dismissed.

A single glance at the facts in the case show how wholly inapplicable it is as an authority in the matter under discussion.

Tenants in common to real estate are entitled to possession and, of course, the Court could not grant a final decree for any disposition of the property, or deal with it so as to affect the rights of tenants in common, who are not parties.

The Court there cites the case of *Shield v. Barrow*, 17 *Howard*, 180, in which it is said:

> "A very able and satisfactory discussion of the whole subject is that they, that is to say, indispensable parties, are said to be persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Taking this definition thus adopted in the Barney case, and applying it to the facts in this case, let us see whether the State is an indispensable party to these proceedings.

Can a final decree be made without affecting the interest of the State? We say that it can, because the interest of the State is declared to be simply a surplus after just liabilities are ascertained, and the purpose of this proceeding is to ascertain the "just liabilities" and no more. The Court will not assume that there is any other purpose than to ascertain what is justly due to creditors. It will not do to say that the State is entitled to be present in the ascertainment of these amounts, because we are not dealing with the question now as to whether the State is a proper party, or whether the State could not be a party if she sought to come in, but whether in her absence the interest of other parties can be ascertained. In other words, there is no claim on behalf of the State

against this fund, which is to be adjudicated in these proceedings. The State has parted with the title, and the title can be disposed of without the State. There is no account for the State filed with the commission or in this Court, as in the case of the creditors. The State is not a creditor, but only entitled to the "surplus" after the creditors are paid. The State could seek no affirmative relief if a party to the proceedings. It would simply stand by while the investigation was being made. If it is said that the State has undertaken this investigation, and that the powers of the former investigating committee have been by this Statute of Feb. 17, 1907, in express terms, conferred upon the "Winding-up Commission," we answer that that has nothing to do with the question, because, by assuming jurisdiction, the Court does not preclude the State from continuing to participate in such investigation of the claims, nor could it, if it so wished; but the point we make is that the Court has a right to proceed without the State in ascertaining what are the just liabiliies, because the State has no claim to be asserted against the commission, for any specific amount, and the State has no longer title to the fund.

Now, as to the second part of the definition: Can a final decree be made in this case, without the presence of the State, without leaving the controversy in such a condition that its final determination may be inconsistent with equity and good conscience? Certainly, there are no conflicting equities or rights between the creditors, nor liens to be adjusted, nor any right to be ascertained, except how much liquor various claimants sold the Dispensary, and how much money is due therefor, and this in the light of the fact that there is far more than enough to pay all, and that the State is entitled to the surplus. If these matters cannot be fully adjudicated in the proceedings as they now stand, it is inconceivable to suppose that they could be adjudicated before the commission.

The conclusion of the Circuit Judge and Circuit Court of Appeals, that the State was not an indispensable party, and could not claim the immunity provided in the Eleventh Amendment, because it had gone into the business of dealing in

liquors, preventing its citizens from engaging in the same business, is sustained by the reasoning of the decision in the *State of South Carolina against United States*, 199 U. S., 437, for the collection of internal revenue tax, where it was held that the state may control the sale of liquor in South Carolina, but when it does so it engages in ordinary private business, which does not by the mere fact that it is being conducted by a State exempt it from the operation of the taxing power of the National Government.

The Internal Revenue tax on the sale of liquor is not a tax on property or profits of a business, but a charge on the business irrespective of the property used therein, or the profits realized therefrom. The exemption of the State agencies from National taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business, and in the case cited—*Barings against Dabney*, 19 *Wallace*, 1, the State was actually the owner of the entire assets of a bank, and had, by legislation endeavored to use the assets for the payment of the debts of the State as against the debts of the Bank, and the Court denying this right proceeded to administer the assets, the State not being a party to the cause.

This brings us within the line of the cases cited in support of the position that the officers of the State are really those who are the proper defendants in this case, who have the custody of the fund and the disposition of it, under a Statute, and that the Court can fully administer the fund without the presence of the State.

In the actions now before the Court the plaintiffs allege that there are specific amounts due them in the Fleischman case; that such amounts have been passed upon by the commission (see folio 29).

Now, under the express terms of the Statute, these are due from a trustee to a *cestui que trust*, and the presence of the State as a *cestui que trust* is not necessary to determine that issue. While these are not *aliquot* parts of a fund, they are fixed and determined, and the State is not entitled until they are paid.

"When each *cestui que trust* is entitled to an *aliquot* share of an ascertained fund, he may sue alone for any accounting as to his interest, and the *cestui que trustent* entitled to the other *aliquot* shares are not necessary parties. (22 Encl. Pl. & Pr., 100, and cases cited.)

"That the State cannot be made a party in a case where it is concerned is a sufficient reason for the omission to do so, and the case may proceed to decree against her officers in all respects as if she were a party to the record."

Davis v. Gray, 16 *Wall*, 203, *Citing Osborne v. Bank, supra.*

The decision of the Supreme Court of South Carolina in *Water Power Company v. Electric Company*, 43 S. C., 154, where it was held that the State was an indispensable party, was based upon the fact that the State had reserved certain rights to water power when it conveyed the power to a company, and the Act of the State was drawn in question. In the case at bar it is the failure of the State's agents to obey the State which forms the basis of the action. Referring to *In re Ayers*, 123 U. S., 500, the Court said that the distinction lay between that case and a case where the officers were wrong-doers, personally and individually, against whom the complainants had a clear right of action, and that no other parties were necessary.

And in another South Carolina case of *Lord v. Bates*, 48 S. C., 95, it was said that the State was not a necessary party to an application by a private citizen for mandamus to enforce a private right, and this was an application to compel the State reasurer, by mandamus, to fund certain bonds of the State under a Statute providing for such funding on certain conditions, the construction of the Statute being the matter before the Court, and the result of the case being to increase or not to increase the debt of the State, a matter in which it was vitally interested.

An examination of the legislation which vested this fund in the State Dispensary Commission shows that they represented the State to the extent of any surplus that may

remain after the just liabilities of the State have been paid. In other words, that it being their duty to see that the surplus was paid to the State after the debts contracted, for the purchase of liquor had been extinguished, the State was, and is, through them, constructively before the Court, as the record now stands.

The State could not be made a party as such, but the State can designate officers and agents to represent her so that she is represented in the proceeding by the officers of her own creation and appointment.

In *Arthur against Hughes*, 4 *Beavan*, 506, it was held that where an ascertained fund was remitted from abroad by an executor to a person in England to distribute between legatees, that the Court could determine the right of the legatees, without having a legal personal representative before the Court.

To avoid the rule thus clearly established in the older cases and affirmed at least in analogous cases of later date, the effort is made here to persuade the Court that there is no specific appropriation of the fund for these creditors of the State, but that the amount is uncertain and cannot be made certain except in a proceeding to which the State is a party.

We maintain that under the Act of 1907 there is a clear, specific appropriation of all funds derived from the sales of liquor to the payment of the debts contracted in its purchase, and that while the commissioners were to ascertain and determine which of the claims against the State were just, the State herself reserved no interest whatever in the fund until these liabilities had been paid.

In other words the creditors of the State were to be paid out of the fund so long as the fund lasted, until such debts were paid, and if a surplus, the surplus then to go to the State.

The presence of the State, therefore, was only necessary to fix the amount to be paid the creditors, and so long as the Commissioners are before the Court the State is represented by and through them, and her interests can be thus fully protected.

In discussing this question the petitioner's counsel, at page 11 of their brief, quote from the opinion of the Circuit Court of Appeals, in which that Court argues that where the duties

of the trustees are clearly defined, the trustor is not even a necessary party to a suit brought to compel the trustees to discharge their duty, and reference is also made to what was said in the opinion of the Circuit Court of Appeals with reference to an assignment for the benefit of creditors and the similarity of the Act creating the Dispensary Commission to such deed of assignment.

So far as the latter suggestion is concerned, it is enough to say that the Court referred to an assignment for creditors simply by way of illustration and comparison. It is true that the authorities cited by the petitioners seem to hold that in an action to enforce a trust under an assignment for creditors the assignor must be a party, if the deed provides that the surplus shall go to him, but the illustration adopted by the Circuit Court of Appeals is nevertheless appropriate to the case in hand, because of the peculiar conditions existing at the time of the passage of the Statutes under consideration.

The most casual reading of the Statutes will show that the primary object was to pay the debt incurred in the purchase of the liquor, and that the entire fund was assigned to the commissioners for that purpose. Their primary duty was to ascertain the debts and pay them, and it is submitted that under the authorities cited a right of action must necessarily be implied in the creditors to recover the amounts due them in an action against the trustees of the fund, especially after these debts have been ascertained by them.

In support of their contention the petitioners claim that the debts sought to be collected in this proceeding are debts of the State, and that they, the commissioners, represent the State. If this be the correct view, then it is submitted the State is constructively before the Court, and that is all that is required by the rule laid down by the authorities cited in petitioner's brief.

Besides *Gregory vs. Stetson*, already referred to, the petitioners refer to the case of *Minnesota against Northern Securities Co.*, 184., U. S., 235, in which the rule is "that those are to be made parties who are either legally or beneficially interested, so that a complete decree may be made."

If, therefore, the object of the winding-up Statute in the

case before the Court was to ascertain primarily what debts were due, and the commissioners themselves were to determine this, as representing (necessarily by virtue of their office and powers) the State—as they claim—then the State as a beneficiary of the fund, if it is a beneficiary, is "constructively" before the Court as the matter now stands.

The test, as applied in *Cunningham against Macon R. R. Co.*, 106 U. S., 440, cited in petitioners' brief, is whether the presence of the party is indispensable in order to enable the Court, according to the rules which govern its proceeding, to grant the relief sought.

In *Christian v. Atlantic, etc., R. R. Co.*, 133 U. S., 233, it is said that the State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its debts, and it appears in the case now before the Court, upon the very face of the record, that the plaintiffs are not attempting to take the property of the State; the State has itself appropriated these funds specifically to the payment of such liabilities as shall be found to be just, and has relinquished its title to the property in dispute absolutely and irrevocably, and is only exacting that the surplus shall be paid to it after it has been determined what are the just liablities.

In *Williams v. Bankhead*, 19 *Wallace*, 571, and in *Barney v. Baltimore*, 6 *Wallace*, 280, the test is: will an absent party be directly affected by a decree made in his absence? And a complete answer to the objection now made to the absence of the State, and the assertion that the State is an indispensable party, is that the State cannot be affected by the payment of the just debts and liabilities of the State Dispensary, because, under the terms of the Statute, those liabilities are to be provided for and paid at all events.

In other words, even in the light thrown upon the question by these authorities, the interest of the State cannot suffer or be affected by a determination in the forum sought by the petitioners on the question of the justness of their debts, that being, as has been shown, the primary object of the Statute.

This view was taken by the Circuit Court of Appeals, and none of the authorities cited by the petitioners show that there was error in so holding.

Again, the same doctrine, that it is sufficient if the party, whose absence constitutes the ground of complaint, is constructively before the Court, is clearly laid down in the cases cited by the petitioners, *Chadbourne v. Coe*, 45 *Fed.*, 822, and *Ribon v. Railroad Co.*, 16 *Wallace*, 450. It is said there that the Court should not proceed unless the party is actually or constructively before it, and so on in effect, if not in express terms, it is decided in all of the authorities cited in the petitioners' brief.

In other words, the extent to which the Courts have gone is that, though they will not proceed to pass upon the rights of absent defendants, who have a substantial interest in the thing in controversy, they will do so if such defendants are constructively before the Courts, so that their interests must necessarily be provided for in any decree which may be made as betwen the parties then and there before the Court.

The opinion of the Circuit Court of Appeals has presented this matter in another aspect, which is very suggestive, and which is practically conclusive of the question now under discussion. Briefly stated, it is this: There is no doubt but that the State can now come in and be made a party for the protection of whatever interests she may have in this fund, if so minded. Can the State remain out of the case, having by previous legislation gone into the liquor business, and having conducted it for years, and now fall back, as an excuse for her voluntary absence, upon the protection offered by the provisions of the Eleventh Amendment to the Constitution? The conclusive answer is found in the case cited in the opinion below, *Bank of United States against Planters' Bank of Georgia, Wheaton*, (22 United States) 904, in which it is said:

> "It is, we think, a sound principle that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

And we refer also to another case cited by the Circuit Court of Appeals in the same connection. *South Carolina vs. United States*, 199 *U. S.*, 437, *in which it was said*:

> "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

THIRD.

The Question as to the Jurisdiction of the Circuit Court.

See *Gunter, Attorney General of South Carolina, v. Atlantic Coast Line R. R. Co.*, 200 *U. S.*, 273.

In this case the railroad company claimed exemption from taxes as to a part of its line theretofore controlled by another corporation which had been so exempt by the Legislature for a number of years. It was claimed that such exemption was of force although the property so exempted had passed into the hands of the then owners. It appeared that the suits had previously been brought against certain County Treasurers to enjoin the collection of taxes, and in such suits the Attorney General, pursuant to statutory provisions, had appeared on behalf of the State. It was held that this was a waiver of the immunity of the State from suit, and that such immunity could not be invoked in an ancillary suit subsequently brought against the successors of the original defendants to enforce the decree.

It is possible, therefore, for the State to waive its immunity from suit. The Circuit Court of Appeals held under the authorities cited that such immunity was waived when the State went into the business of buying and selling, and that such immunity, under the Eleventh Amendment, could not be claimed as against bills contracted in the purchase of the merchandise which the State undertook to buy and sell. We

submit that this is just as strong a waiver as the appearance in Court of the Attorney General in the *Gunter case* "for and on behalf of the State of South Carolina."

It will be remembered that the Dispensary had been established and maintained, purchases made, and debts contracted by the authority of Act of the Legislature, and it is submitted that this was a waiver of its immunity from such for the reasons so cogently stated and emphasized by the Circuit Court of Appeals.

The argument upon the other questions raised by the petition will, we think, satisfy the Court that the Circuit Court did have jurisdiction of the subject matter and of the parties to these suits. The precise question, however, was determined in *Chaffraix v. Board of Liquidation and others,* 11 *Fed. Rep.*, 638, where it was held "the Circuit Court has jurisdiction to prevent, by injunction, the officers of a State from divesting a fund collected by taxation and set apart under a Statute of that State to pay certain bonded indebtedness of said State, to the end that said fund may be preserved intact until the rights of the parties and the interests of the State, of any she has, may be determined contradictorily. Such action is not forbidden by the Eleventh Amendment of the Constitution of the United States, and is necessary for the proper enforcement of Section 10 of Article 1 of the same instrument."

A further discussion of this question arises incidentally in what is to follow upon the next point. We assume that under this head petitioners will maintain that the defendants constitute a Court, and that under Section 720 of the Revised Statutes injunction will not lie to restrain them as prayed for in the bill.

There have been many commissions and boards and other similar bodies established by the State legislation throughout the years, and the question has often arisen in this and other Courts as to whether these constitute Courts, as the term is usually understood?

If we go back to Blackstone's Commentaries we find that in Volume 3, page 25, a Court is defined in modern signification "to consist of at least three constituent parts, the *actus*,

the *reus* and the *judax*—the actus, or plaintiff, complains of an injury done; the reus, or defendant, is called upon to make satisfaction for it, and the judax, or judiciary power, is to examine the truth of the fact, and if any injury appears to have been done to ascertain and by its officers apply the remedy."

It would be difficult to find a definition which more clearly describes a Court in all its parts and all its functions.

In *United States against Ferreira*, 13 Howard, 373, the question arose whether the District Judge of the United States for Florida, who by Act of Congress was directed to adjudicate the claims for injuries suffered by the inhabitants of Florida by operation of the American Army in Florida—which claims were to be paid if the Secretary of the Treasury should, on report of the evidence, deem it equitable, constituted a Court, and it was held that the authority given him was not to exercise any of the judicial powers of the United States under the Constitution, but that the Judge acted as a "Commissioner," and no appeal lay from his decision to the Supreme Court.

The question is very elaborately discussed, and the want of power as a Court was held to exist because of the provisions of the Constitution of the United States. This authority naturally leads us to consider the Constitution of South Carolina in its bearing upon the question now before the Court.

The only Courts provided for under the Constitution of the State of South Carolina are, first, a Court for the trial of impeachment; second, a Supreme Court; third, a Court of Common Pleas and General Sessions; fourth, a Probate Court; fifth, Courts of Magistrates, and sixth, such other inferior Courts as the General Assembly may from time to time in their wisdom establish.

A commission cannot be held to be within the terms of this constitutional provision, in that it is not in any respect "an inferior Court." It has no power to enter judgment or issue execution. There are no pleadings provided for it, no procedure adopted; provision is not made for appearance of parties before it in the way in which they are ordinarily to appear

in Court, and a careful examination of the entire Statute fails to disclose that the Legislature contemplated the creation of any kind of Court.

In Section 7 of the Statute (see folio 127) it is directed that the Commission shall submit to the Governor at the earliest date practicable a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

It would be inconceivable to suppose that the Legislature intended to create a Court which was to report to the Executive head of the State. The Executive and Judicial functions and departments are forever to be separate, and such provision would violate the spirit of our institutions.

The commissioners, as we have seen, are to give each a bond for ten thousand dollars. What a strange departure in our legislation, to require a Judicial Officer to give bond. Each of the commissioners is to have the power of all of them. This shows clearly the intention that they shall act simply in a ministerial and not in a judicial way.

Referring again to the Constitutional provision to which we have heretofore referred, we find that in this last cited case the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create Courts inferior to the Supreme Court, and by implication to define their jurisdiction, and it was held that this did not confer the power to create Courts for the exercise of legislative or administrative functions.

In *Chicago, Milwaukee, etc., R. R. against Minnesota,* 104 U. S., 418, the question arose whether a warehouse and railroad commission constituted a Court.

The usual powers given to such organization were conferred by an Act creating it, and it was held that the Act was in conflict with the Constitution of the United States as depriving a company objecting to the rates fixed by the Commission of its property without due process of law, and deprived of the equal protection of the law. It appears that the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the Commission if it chose to establish rates which are equal and unreasonable,

and in considering this question the Supreme Court of the United States, speaking by Mr. Justice Blatchford, says: (Page 456-467.)

> "This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of Justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be Courts having the right under the Statutes creating them finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

We think this disposes of the view raised in the pleadings that this "Winding-up Commission" constitutes a Court whose proceedings cannot be enjoined within the provisions of Section 720 of the Revised Statutes.

Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, engaged in the investigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the Dispensary were clearly

intended simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact: what are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that institution.

They are to "sell property and to pay debts"—to pay all "liabilities" or "all just liabilities"—it matters not which, "of the State Dispensary."

In other words, they are to take the assets as they find them and, as agents or trustees, sell and realize upon them, and as such agents or trustees pay out the proceeds of their collections, returning to the State the surplus, if any.

In the *Southern Pacific against the Board of Railroad Commissioners*, 78 Fed., 236, the question arose as to whether certain Boards of Commissioners for railroad and other corporations created under the Constitution and laws of California constituted a Court. They were named there also "A Commission." Now, these Commissioners were given very large powers. *Inter alia*, they were to establish rates of charge for transportation of passengers and freight by railroad and other transportation companies, and they could enforce their decisions and correct abuses through the Court, and it was held (Judge McKenna) that this Commission was not a Court.

In *Ex Parte Childs*, 12 S. C., 111, it was held that a Commissioner appointed to take proof of bonds alleged to be invalid, and to ascertain and report what bonds and what proportion of bonds were valid obligations of the State, was not a Court, but only an officer charged with certain ministerial duties. Here it was called a Court—"The Court of Claims"—and had many of the attributes and functions of a Court.

In *Busch v. Webb*, 122 Fed., 655, it was held that a Commissioner's Court of a county in Texas, in declaring and publishing the result of the election, "acts ministerially and is not a Court in the meaning of the Revised Statutes" (Sec. 720) "whose action in such capacity may not be restrained by the Federal Court."

This question is very fully considered and the authorities cited, and it was held that something more was necessary than the mere conferring of ministerial powers, even when the exercise of such powers was to lead to a definite result in reference to the election.

Western Union Telegraph Company vs. Myatt, 98 *Fed. Rep.*, 331. The question arose in this case as to whether the Court of Visitation of Kansas created by an Act of Legislature and given thereby and by the general laws of the State general powers to regulate the business of railroad and telegraph lines within the State, and among others the power to classify freight, to require the maintenance and construction of depots, regulate crossings and intersections of railroads and the operation of trains, with various other powers and duties, therein mentioned, is in the exercise of such power a legislative, administrative body, or whether it was a Court. It was held that it was the former, though it was denominated "a Court," and provided with the machinery of one, and it was held that even the power to conduct an investigation in the form of legal proceedings, before taking action in the matters committed to it, did not constitute it a Court.

Referring again to the constitutional provisions to which we have heretofore referred, we find that in this last cited case the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create Courts inferior to the Supreme Court, and by implicaton to define their jurisdiction, and it was held that this did not confer the power to create Courts for the exercise of legislative or administrative functions.

In *Chicago, Milwaukee, etc., R. R. against Minnesota*, 104 U. S., 418, the question arose whether a warehouse and railroad commission constituted a Court.

The usual powers given to such organization were conferred by an Act creating it, and it was held that the Act was in conflict with the Constitution of the United States as depriving a company objecting to the rates fixed by the Commission of its property without due process of law, and deprived it of the equal protection of the law. It appears that

the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the Commission if it chose to establish rates which are equal and unreasonable, and in considering this question the Supreme Court of the United States, speaking by Mr. Justice Blatchford, says: (Page 456-457.)

> "This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be Courts having the right under the Statutes creating them, finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

We think this disposes of the view presented in the exceptions and raised in the pleadings that this "Winding-up Commission" constitutes a Court whose proceedings cannot be enjoined within the provisions of Section 720 of the Revised Statutes.

Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, en-

gaged in the investigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the Dispensary were clearly intended simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact. What are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that Institution.

We desire to call the Court's attention to the recent case of *Robert R. Prentiss et al v. Atlantic Coast Line R. R. Co.*, and was decided by this Court in December last. This case involved the question whether the United States Circuit Court could restrain the State Corporation Commission of Virginia from enforcing certain passenger rates fixed by that Commission under Statutes authorizing them so to do, passed by the Legislature of Virginia, upon the ground that such legislation was unconstitutional. The Circuit Court had issued the injunction, and its action was reversed by the Supreme Court, but this reversal was upon the ground only that a right of appeal was provided to the Court of Appeals of Virginia from the judgment of the Corporation Commission, and that it was proper that such appeal should be taken and the matter finally disposed of in the highest Court in the State of Virginia, before this Court could interfere on writ of error from that Court. A majority of this Court sustain, however, the position taken that injunction to restrain the enforcement of such rates would lie notwithstanding that some of the powers given to the Corporation Commissions were of a judicial nature, that is to say that the Commission was to act judicially in determining the rates paid; in enforcing them it was simply performing the duty put upon it by the Legislature. It was also held that a bill filed in the Federal Court against the State Commission to restrain its members from enforcing railway passenger rates, established by such Commission, on the ground that such rates are confiscatory, is not bad as an attempt to enjoin legislation, or as a suit against the State.

FOURTH.

The Fund in the Commissioners' hands Constitutes a Trust Fund.

The fourth question raised in the petition is whether the Circuit Court of Appeals erred in holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

In *McKee against Lamon*, 159 United States, 317, it was held that "where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which may be enforced by a bill in equity if not by an action of law, and that the acceptance of money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purpose intended by the bailor, and that in the enforcement of such a trust a Court of Equity may make such incidental orders as may be necessary for the proper distribution of the fund."

In *Clews against Jamison*, 182 U. S., 401, funds were placed in the possession of the Governing Committee of the Stock Exchange in trust, that it would see that the purposes of the deposit were fulfilled, and that the money was paid out only in accordance with the terms of the Trust under which it was deposited," and it was held that there was no question that the fund became thereby a *trust fund* in the possession of the Governing Committee, and that it must be disposed of in accordance with the trust. "The Committee occupied, from the time of the deposit, a fiduciary relation towards the parties depositing it and became a Trustee of the fund, charged with the duty of seeing that it was thus applied."

The foregoing principles thus laid down in these authorities are general, but if it be said that they have no application to the fund owned by a State, the answer is found in the decision of the Supreme Court of the United States in *Baring vs. Dabney*, 19 *Wallace*, 1. In that case it appeared that in 1812 the Legislature of South Carolina by Statute created a bank by the name of "The Bank of the State of

South Carolina," the capital was to consist of various stocks, bonds and securities specified, then belonging to the State, the same being, in fact, all the funds, bonds and securities which the State owned. The bank thus belonged to the State. The President and Directors were to be elected by the Legislature, and made a corporation and body politic. The faith of the State was pledged to the support of the bank. In December, 1821, by another Statute, the future profits of the bank were pledged and set apart for the payment of a certain six per cent. stock which the State had previously issued. This Statute, as well the subsequent legislation, gave rise to the controversy in the case, and the question arose whether the Statute could appropriate assets of the bank so as to divert them from the debts of the bank to the debts of the State, and it was held that although the stock was altogether owned by the State, if the bank be insolvent, its assets cannot be appropriated by legislative act or otherwise, to pay the debts of the State as distinguished from the debts of the bank; *that the assets of the bank were a trust fund, first applicable to the payment of the debts of the bank.*

It was said that "An Act of the Legislature requiring the managers of an insolvent bank belonging to the State to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts and, if assented to by them, amounts to a contract with them to carry out said trusts."

And to give effect to such legislation so substituting the debts of the bank for the debts of the State would be to approve a law which was repugnant to the clause of the Constitution which prohibits a law impairing the obligation of contracts.

Now, in this case the assets of the State Dispensary were originally owned by the State, but were pledged by the very Act creating the Dispensary, from the very necessity of the case, to the payment of the debts of the Dispensary. The creditors of the Dispensary could never have sued the State for the recovery of the amounts due them so long as the money remained in the treasury of this State; but when

the money was transferred by subsequent legislation to the Commissioners it went into their hands impressed, from the relation of the parties and the nature of the original contracts, with a trust in favor of the creditors, which must be recognized in advance of the implied trust which still remained for the State, even if there had been no express trust for the State, as to any surplus after the creditors were paid, and the clear intention of the Statute is to give the creditors, first, a controlling lien upon this trust fund so in the hands of the Commissioners, otherwise the Statute is a vain excuse, giving the creditors no security whatever, and would evidence, what we do not think could be possible, a disposition on the part of the State to ignore and defeat their claims, in order that the State might reap a larger profit. Such, we submit, cannot be the construction of the Statute; and even if it were the intention of the Legislature thus to defeat the claims of the creditors of the State by continuing to keep the money beyond their reach, such act would be unconstitutional. Good faith, as well as the legal obligation, required that that should be done which was intended to be done, to impress upon this fund a trust which should remain until the last dollar of just indebtedness had been paid, and that, too, before the State could receive one dollar of the money.

As further illustrative of the position that this is a trust fund in the hands of the Commissioners, see *Macnhaut et al against City of New Orleans et al, 2nd Woods*, 108.

In that case money was collected to pay the interest on bonds issued by the municipal corporation, under an Act which provided that a tax to pay the interest should be levied, and enacted safeguards to secure the levy and collection, on the faith of which legislation the bonds were sold. This Act was held a contract with the bondholders, the substantial performance of which they are entitled to exact, and it was further held that the money collected to pay the interest on said bonds levied, collected and set apart according to the provision of the Act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders.

See also in this connection, *Case v. Beauregard*, 101 U. S., 688.

In the case of *"Board of Liquidation against McComb*, 92 U. S., 531, will be found an elaborate consideration of the entire doctrine."

In that case it was held that although the State could not be sued by an individual, and that a Court could not substitute its own discretion for that of executive officers, in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

It is said in "Daniel's Chancery Pleading and Practice," Volume 1, page 243;

> "Moreover, in some cases where the fund, the subject of the suit, has been ascertained and appropriated, the Court has dispensed with the appearance of a personal representative to the testator, by whose will the fund has been bequeathed."
>
> And, in *Gregory against Stetson*, 133 U. S., 585, it appears "that the property upon which that part of the case was decided was that a Court cannot adjudicate directly upon a person's rights without having him *actually or constructively* before it, and it is stated that this principle is fundamental.

The petitioners maintain (page 18 of Petition) that the Act of 1907, under which the Commission was appointed, did not create a trust, and that it did not divest the State of all control or disposal of the State Dispensary Fund, so that the Act next hereinafter referred to would be operative.

To support this position reliance is placed upon certain constitutional provisions, now for the first time invoked in

the cause, with reference to the ascertainment and payment of claims against the State (page 19).

Giving full effect to the South Carolina case of *Bank vs. State*, 60 S. C., 465, there cited, which holds that under the Statute under consideration in that case, claimants had only a right to have their claims established, and to sue upon them, and that such claims were not thereby finally validated, beyond further question, we submit that the Statute in this case is very different. Here the Commission under the Act of 1907 were not only to investigate the claims, and to pass on them, but also to pay them, without further action of the Legislature, out of a fund which was assigned to them by the Statute for that purpose, and this surely created a trust in favor of the creditors, as has been seen.

Here is the distinction between the case at bar and the class of claims contemplated by the constitutional provisions relied on, and also when the case also relied on, of *Campbell vs. Sanders*, 43 S. C., 577, was decided.

A mere power to investigate his claim would not, of course, create a trust in favor of the creditor, or a legislative contract with him. But the case must be wholly different when the Legislature, recognizing that there is a contract, appropriates money, by handing it over to Commissioners charged not only with the duty to investigate the claims, but also clothed with the power to pay out the trust funds to the beneficiaries provided for as a class in the Statute.

Reference is also made in petitioner's brief to *South Carolina vs. Gaillard*, 101 U. S., 433, and it is claimed that that case is in point. It will be at once observed, however, that the contention there was that the Act permitting the taxpayer to tender bills of the Bank of the State in payment of taxes, and have them sealed up and deposited to await the determination of the question whether they were to be received for taxes, constituted a new contract, while in the present case the Act of 1907, creating the Winding-up Commission, defendants herein, provided that the Commission should itself pay the just liabilities of the State incurred in the liquor business out of the assets assigned to it by the Statute.

The creditors, therefore, had an interest in this assigned fund, if their claims constituted just liabilities of the State Dispensary, and no subsequent legislation could defeat that right, and the Circuit Court had taken jurisdiction, and had jurisdiction of a cause which was to determine whether such claims were then and there to be paid.

We are dealing now with the question whether the money in the hands of the defendants constituted a trust fund. As to the effect of the Act of 1908, which was passed after this proceeding was commenced, and which attempted to lessen the power of the Commission, and change the status, we shall have a brief discussion of the end of this division of the argument.

The petitioner cites a number of cases (page *22*) to the effect that if this Act of 1907 created a Commission, before which the State authorizes its creditors to sue, and to have their claims established and adjusted, then it cannot amount to a contract irrevocable.

An examination of these cases throws very little light upon the question now before this Court, because the Statutes there considered provided simply for the investigation of claims, and not for the payment of them out of a fund specifically provided for that purpose.

We shall take up these cases and briefly see what was involved in them, and the point decided.

Beers vs. Arkansas, 20 *Harvard*, 517.

Here it was held that permission to bring the suit was not a contract, which could not be withdrawn by subsequent legislation. That is not the question here. In this case money has actually been appropriated for the payment of the debt.

Railroad v. Tennessee, 101 *U. S.*, 377.

Here it was held that a Statute which gave a right of action against a State could be repealed, but it does not appear that the right to sue was a part of the original contract, or that the Act giving the right to sue was coupled with a legislative declaration that money should be held in trust to await the result.

Railroad v. Alabama, 101 *U. S.*, 832.

In this case the Statute gave the right of action against the State, and was afterwards repealed. *Held* that this deprived the Court of jurisdiction, but did not impair the obligation of the contract.

The difference between this case and the one under discussion is obvious, as stated above.

Hans v. Louisiana, 134 *U. S.*, 17.

This case decided two points—That a State cannot be sued by one of its own citizens in a Federal Court without its consent, and that when a State attempted to violate property rights, acquired under a contract with it, such attempt may be judicially resisted, and any law impairing the obligation of such a contract is void and powerless to affect such rights.

In re Ayers, 123 *U. S.*, 507.

Here also was a case involving the Statute of Virginia as to tendering coupons of State bonds for taxes, and the bringing of suits to recover the taxes from person so tendering them, and can have no reference to this case.

DeSaussure v. Gaillard, 127 *U. S.*, 216.

In this case it was held only that when the State gives the right of action against one of its officers, which is practically against the State, it may provide for certain limitations and restrictions upon the exercise of the right, which is simply providing for a remedy against the State or its officers, and does constitute a contract, and therefore the Statute could be repealed.

Smith vs. Reeves, 178 *U. S.*, 436.

The point decided here was that when the State permitted one who complained of the assessment of his property for taxes to pay the taxes, and bring an action against the treasurer to recover the amount claimed to have been illegally assessed, the State could couple with the consent to be sued a condition that the suit be brought in one of her own Courts.

The Amendment of 1908.

Now, in this connection, it appears from the record page that the Legislature of South Carolina passed a Statute in 1908 which attempted to enlarge the powers of the Commission, and give it more of the nature and functions of a Court than had been conferred upon it by previous legislation. We submit that this Act of 1908 cannot effect the rights of these complainants now before the Court.

The decision of the State Supreme Court in upholding this Act amending the "Winding-up Act," adopted by the General Assembly on February 24th, 1908, after these proceedings had been begun in the Circuit Court, and only a few days before the decision of the Circuit Judge was announced, fails to recognize and enforce the principle that such amendment is contrary to the Constitution of the United States.

This is essentially a question which this Court will consider whenever it is properly raised, and will disregard the decision of the State Court if it appear that the Statute violates the provisions of the Federal Constitution.

It appears at page 204 of the record that the State Court gave full force and effect to this amendatory Statute, and it also appears, at page 206 and 7, in the traverse filed by the plaintiffs to the return of the defendants, that the defendants set up in the first paragraph of their traverse that they are advised and verily believe said Act (that is the first Act creating the "Winding-up Commission), and the acceptance by the defendants, constituting the State Dispensary Commission, as trustees of the trust created by said Act, and the acceptance by the complainants and the other creditors of said State Dispensary as *cestui que trustent* of the benefits of the trust so created, constitute a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States.

And in the second paragraph the plaintffs specifically assail the said amendatory Act of 1908 as a violation of the provisions of Art. 1, Sec. 10, of the Constitution of the United States, and Article 14, Section 1, of the amendments thereof, upon the ground that said Act impairs, and attempts to impair, the obligation of the contract set out in the 1st paragraph,

and deprives, and attempts to deprive, the complainants of their property without due process of law, and denies, and attempts to deny, them the equal protection of the law.

It is to be observed that the first Act creating the commission specifically directed them to pay the just liabilities of the State Dispensary; and the second Act, amendatory thereof, passed after the plaintiffs had filed accounts with the Commission, and had had them adjudicated, and when the only thing left to be done was to pay them, gives the Commission very large powers to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary; and it directs it to pay only such claims as have been submitted to and determined by it, and no others, out of the assets of the Dispensary.

It is true it does give the claimants the right to appeal to the Supreme Court as in cases at law and regulates the practice on such appeals.

This Court, we submit, had jurisdiction of these complainants and defendants before this Statute was passed, and had it for the purpose of enforcing the provision of the former Statute upon a state of facts crystallized before the proceeding was brought. The rights of these complainants, therefore, were fixed, first under the Statute of 1907, and secondly by the orders of this Court in this proceeding.

An attempt, therefore, was made to deny and deprive the Circuit Court of its jurisdiction by passing the other Act.

Now, the new Act would require these complainants, if it affects them at all, to go before the Commission again and try their case, and appeal to the Supreme Court of the State, and wait until in the usual course of business in that tribunal the case might be heard and the decision handed down.

The new Act, therefore, was a denial of the rights which the complainants had under the old contract, that is, to proceed to the office of the Commissioners and receive their money upon claims which had been passed upon by them, and it impaired materially the rights given to the plaintiff under the Act of 1907, which were the rights of the *cestui que trustent*, to demand of the trustees a prompt and faithful performance of their duty.

In *Antoni v. Greenhow*, 107 U. S., 769, the same process was adopted by the State of Virginia. Procedings were pending in the Courts to enforce the payment of coupons upon State bonds by tendering them for taxes. The Legislature adopted an amendment of the Statute, under which this was permitted, which amendment provided another mode of procedure than that in force when the coupons were issued. The Supreme Court held that the new section furnished an adequate and efficacious remedy, substantially equivalent to that which existed at the date when the coupons were issued, and, *therefore*, the rights of the holder of them, in case the collector refused to receive them for taxes, can be maintained and enforced, and that the obligation of his contract with the State was not thereby impaired.

The difference between that case and the one now before the Court is obvious. The plaintiffs here are absolutely deprived of their money until they have complied with the regulations and gone through a process not included within the terms of the Statute which created the trust of which they are the beneficiaries.

Pennoyer v. McConnaughy, 140 U. S., 1.

An Act of the Legislature of Oregon, of January 17, 1879, repealed an Act of that State of October 26th, 1870, both Acts concerning the swamp and overflowed lands, and the second Act made new regulations concerning the same. An application to purchase some of these lands had been filed after the first Act before the enactment of the second. It was held, first, that such an application could not be perfected by making the payments required by the Act of 1870, after its repeal, but within the time prescribed by that Act, and the title thus acquired was good against the State; it was further held that the Act of the Legislature of 1887, declaring all certificates of sale of swamp or overflowed lands void, on which twenty per cent. of the purchase price was not paid prior to January 7th, 1879, and required the Board of Commissioners to cancel such certificates, impaired the contract made by the State with the defendant in error, under the Act of October 26th, 1870, as that Act and the Act of 1879 are construed by

the Court, and therefore in violation of Art. 1, Sec. 10, of the Constitution of the United States.

See also *Piqua Branch of State Bank against Knoop*, 16 How., 369.

Osborne v. United States Bank, 9 Wheaton, 738.

Davis vs. Gray, 16 *Wallace*, 203.

FIFTH.

There is Equity in these Proceedings.

The next question for discussion is whether there is equity in the bills and whether they disclose a cause or necessity for granting an injunction and appointing receivers. It will be observed that the position taken in the bills filed in the several causes is that these claims had been adjusted by the commissioners who had refused to pay them, and that unless this Court of equity interfered by injunction the funds would be put into the hands of the State Treasurer and thus placed beyond the reach of the complainants and other creditors in like situation. (See pages 269-270-271 of Transcript.)

The law upon this point is very clear.

In Wyman vs. Wallace, 201 U. S., 230, *it is said*:

"It is suggested that no judgment had been obtained upon the note prior to this suit in equity, but as one object of the suit was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor, no judgment at law was a prerequisite, Day v. Washburn, 24 How., 352; Case v. Beauregard, 101 U. S., 688, 691, in which the Court said: 'Without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 *N. H.*, 311; *Holt v. Bancroft*, 30 *Alabama*, 193.'"

The same doctrine is sustained in the case of *Denver Railroad against United States*, 124 *Fed. Rep., page* and also in 20 *American and English Ency. of Law*, 345.

Here the trust is given by the Statute, the positive direction

of which is that the just liabilities be paid. The debts have been ascertained and should be paid, and the fund kept intact for that purpose.

The purpose of the action and the prayer of the bill is to preserve the fund for the benefit of the *cestui que trustent.*

SIXTH.

The two remaining assignments of error (six and seven) complain that the Circuit Court of Appeals did not reverse the order and decree for injunction and appointing receivers, and in not directing the dismissal of the bill. These are general and are disposed of in the discussion of the questions raised by the other exceptions.

T. MOULTRIE MORDECAI,
FRANK CARTER,
SIMEON HYDE,
H. C. CHEDESTER,
Solicitors for Wilson Distilling Company, Respondent.

Office Supreme Court, U. S.
FILED.
MAR 2 1909
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, ET AL., PETITIONERS,

versus

WILSON DISTILLING COMPANY ET AL. AND THE FLEISHMANN COMPANY, RESPONDENTS.

MEMORANDUM CALLING ATTENTION TO THE PROVISIONS OF THE SOUTH CAROLINA STATUTES SUBMITTED FOR RESPONDENTS.

T. MOULTRIE MORDECAI,
Of Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, ET AL., PETITIONERS,

versus

WILSON DISTILLING COMPANY ET AL. AND THE FLEISHMANN COMPANY, RESPONDENTS.

Memorandum Calling Attention to the Provisions of the South Carolina Statutes Submitted for Respondents by T. Moultrie Mordecai.

The original Dispensary Act, Laws of 1892, Twenty-first Statute, was passed on December 24, 1892, and in section 2 provides as follows:

> "The State commissioner shall not receive from said county dispensers for such liquors sold to them more than fifty per cent. above the net cost thereof, and all amounts so received by him from said sales shall be by him paid over to the treasurer of the State monthly, under such rules as may be made by the State board of control to insure the faithful return of the same; and the State treasurer shall keep a separate account with said fund, from which the commissioner shall draw, from time to time, upon warrants

duly approved by the said board, the amounts necessary to pay the expenses incurred in conducting the business of said agency."

The next act, Laws of 1893, Twenty-first Statute, was approved on December 23, 1893, and in section 3 provides as follows:

"The State commissioner shall deposit all amounts received by him from sales to county dispensers or others with the treasurer of the State under such rules as may be made by the State board of control to insure the faithful return of the same, and the State treasurer shall keep a separate account with said fund from which the commissioner shall draw from time to time, upon warrants duly approved by the chairman of said board, the amounts necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors, or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

The next act, Laws of 1894, Twenty-first Statute, was approved on January 2, 1895, and in section 3 provides as follows:

"The State commissioner shall deposit all amounts received by him from sales to county dispensers or others with the treasurer of the State under such rules as may be made by the State board of control to insure the faithful return of the same, and the State treasurer shall keep a separate account with said fund, from which the commissioner shall draw from time to time, upon warrants duly approved by the chairman of said board, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

The next act, Laws of 1896, Twenty-second Statute, was approved on March 6, 1896, and in section 3, page 125, provides as follows:

> "Each county dispenser shall remit to the State treasurer all moneys accruing to the State from the sale of liquors under such rules as may be prescribed by the State board of control, and the State treasurer shall keep a separate account with said fund, from which the State board of control shall draw from time to time upon warrants, or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner or county dispensers in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

And again, another act in the same volume, page 149, Act No. 62, approved March 9, 1896, provides as follows:

> "An Act to Require the State Treasurer to Transmit Monthly to the State Board of Control Monthly Statements.
>
> "SECTION 1. Be it enacted by the General Assembly of the State of South Carolina, That from and after the passage of this act, in order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer on the first days of each and every month to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month, and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees, together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month.
>
> "Approved the ninth day of March, A. D. 1896."

The next act, Laws of 1897, Twenty-second Statute, was approved on March 5, 1897, and in section 3, page 540, provides as follows:

> "Each county dispenser shall remit to the State treasurer all moneys accruing to the State from the sale of liquors under such rules as may be prescribed by the State board of control, and the State treasurer shall keep a separate account with said fund, from which the State board of control shall draw from time to time upon warrants, or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner or county dispenser in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

Section 9, page 131, Laws of 1898, provides in part as follows:

> "All moneys received by the county dispenser belonging to the State shall be forwarded on Monday of each week to the State treasurer, and at the same time the county dispenser shall forward to the State board of control a duplicate statement of the remittance so made to the State treasurer."

The next act, Laws of 1900, Twenty-third Statute, was approved on February 13, 1900, and in section 3, page 437, provides as follows:

> "The said board shall devise such a system of bookkeeping and accounting as it may deem advisable. The said board shall prescribe all rules and regulations, not inconsistent with law, for the government of the State dispensary and the county dispensaries."

The Code of Laws of South Carolina, 1902, section 699, page 279, provides as follows:

> "All payments by the treasurer of the State, except for interest on the public debt and the pay of members, officers, and employés of the General Assembly,

shall be made on warrants drawn by the comptroller general, and the vouchers for the claims shall be filed in his office. The said warrants in the hands of the treasurer, properly endorsed, shall be sufficient vouchers for the payment of the same."

Section 706 provides as follows:

"In order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer, on the first days of each and every month, to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month."

Section 710 provides as follows:

"No appropriation placed under the direction of any board of commissioners shall be drawn from the treasury until the contract entered into by the commissioners in virtue thereof shall have been lodged in the treasury."

The provisions of the Code of Laws of 1902, entitled Criminal Code of South Carolina, chapter XXVII, Violation of Laws Repealing the Sale of Spiritous Liquors, will be observed on the part of the Criminal Code, and the provisions of section 706 are in the General Statutes. The Code of Laws of 1902 contains a statement of all repealed statutes since 1882, and none of these acts have been repealed which previously governed the board.

In the State against Loftis (49 S. C., 444) the Supreme Court of South Carolina held that former dispensary acts were consistent with the act of 1902 and were not repealed.

Therefore the provision as to deposit with the State treasurer remains the same.

The criminal act became a law on the 26th day of February (see page XXI, Code of Laws, 1902), and at the same session of the legislature, on the 26th day of February, 1902, the Twenty-third Statute at Large, 1103, the following act was passed:

"No. 602. An Act Relating to Dispensary Profits.

"SECTION 1. Be it enacted by the General Assembly of the State of South Carolina: That the directors of the State dispensary shall pay over to the State treasurer by January 1st, 1904, in equal semi-annual payments, all of the school fund reported by them in excess of four hundred thousand dollars, for the benefit of the common schools of the State, to be apportioned by and paid out on the warrant of the comptroller general as is now provided by law for the apportionment and payment of dispensary profits for the benefit of said schools:

"Provided, That the first payment shall be made on the 30th day of June, 1902.

"SEC. 2. That from and after the approval of this act the directors of the State dispensary shall make quarterly settlements for the purpose of ascertaining the net profits accruing to the State from the sales made from the State dispensary and shall pay over the profits so ascertained to the State treasurer within ten days thereafter, for the benefit of the common schools of the State, to be apportioned by and paid out on the warrant of the comptroller general as is now provided by law for the apportionment and payment of dispensary profits for the benefit of said schools. The first settlement made under this act shall be on the 31st day of March, 1902.

"SEC. 3. That the county treasurers of the several counties of this State shall not pay to the authorities of the several cities and towns, entitled to dispensary profits, their share of such profits except upon the warrants of the county board of control and county auditor issued to the authorities of said cities and

towns, when settlements are made by them as required by law. The said county board of control and county auditor shall at the same time also certify in writing to the county supervisor of the county entitled to share the dispensary profits the amount thereof to which the county is entitled.

"SEC. 4. All profits from county dispensaries subject to distribution among the counties, cities and towns of the State which have accrued since the fourth Monday of December, 1901, and which may hereafter accrue, shall be distributed monthly among the counties, cities and towns entitled thereto in the proportion fixed by law, and that the settlements to ascertain the same shall be made on the fourth Monday in each month, instead of quarterly, as heretofore provided by law.

"Approved the 26th day of February, A. D. 1902."

It thus will be seen that this fund was always kept in a separate fund.

In that year, 1907 (see pages 89 and 333), the General Assembly passed a statute entitled "An Act to Declare the Law in Reference to and to Regulate the Manufacture, Sale, Use, Consumption, Possession, Transportation, and Disposition of Alcoholic Liquors and Beverages within the State and to Police the same." By the forty-seventh section of this statute "the State dispensary is hereby abolished," and "all acts and parts of acts inconsistent with this act are hereby repealed."

(3.)

An Act to Provide for the Disposition of All Property Connected with the State Dispensary, and to Wind Up Its Affairs.

SECTION 1. *Be it enacted by the General Assembly of the State of South Carolina,* That immediately upon the approval of this Act the Governor shall appoint a Commission of well-known business men, consisting of five members, none of whom shall be

members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

SEC. 3. It shall be the duty of said Commission to *close out the entire business and property* of the State Dispensary except *real estate,* and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof *all just liabilities* at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times, and conditions as their judgment may dictate: *Provided,* That no alcoholic liquors or beers shall be disposed of within this State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further,* That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said Commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on this Commission after January 1, 1908.

SEC. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

SEC. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

SEC. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided*, That for the purpose of the investigation of the affairs of the Dispensary, as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D. 1907.

Discussion of the Acts.

For the information of the court, a brief history of the institution known as the State dispensary is in order.

In the year 1892 the legislature of South Carolina passed an act, which Governor Tillman promptly approved, taking away from the citizens of the State the right to engage in the liquor business, and creating a monopoly of the same under the direction and control of a board of commissioners, who

were placed in sole and absolute charge of the entire business of buying and selling malt and spirituous liquors throughout the State.

The State, in order to enable this institution to begin business, made a loan to it, and it will be noted that this was a loan provided to be repaid out of the profits, and under the provisions of the act extreme care was taken to do two things: First, to limit the profit which the monopoly would make; and, secondly, to protect the funds belonging to the institution, so that they would be safeguarded by being kept separate and apart from all other funds in the State treasury: The provision in that statute being that all amounts so received—that is to say, so received from the county dispensaries in the various counties of the State from said sales—that is, the sales made by the county dispensaries—*shall be* by him—that is, the commissioner—paid over to the treasurer of the State monthly, under such rules as may be made by the State board of control to insure the faithful return of the same, and the State treasurer was commanded, in the language of the statute, "shall keep a separate account with the said fund from which the commissioner shall draw, from time to time, upon warrants duly approved by the said board, the amount necessary to pay the expenses incurred in conducting such business.

It will be observed that this provision of the fund being kept separate and apart and being subject to draft by the commissioner upon warrants duly approved by the board of control, the then official title, is radically different from the general provision of law then existing and for many years previous and subsequent thereto, to be found in section 699 of the Code of Laws of South Carolina of 1902, page 279. "All payments by the treasurer of the State, except for interest on the public debt and the pay of members, officers and employees of the General Assembly, shall be made on warrants drawn by the comptroller-general and the vouchers for the same shall be filed in his office. The said warrants

in the hands of the treasurer, properly endorsed, shall be sufficient vouchers for the payment of the same.

There was not then nor subsequently any fund or deposit in the hands of the State treasurer, except the dispensary fund, which was not subject to this section as quoted, and in pursuance of this provision of law the fund was so deposited, so kept separate and distinct and so separately and solely drawn upon as stated.

The next act on the subject was approved on December 23rd, 1893, to be found in the Twenty-first Statutes, and in section 3 provides substantially as in the act of 1892 as to the deposit of the moneys, the keeping of a separate account of the fund and the method under which the same could be drawn.

And again, we next find the act of 1895, approved January 2 of that year, section 3 providing the same as in the act of 1892; this same section in the acts of 1893 and 1895 also providing that all rules and regulations not prescribed or provided for by law shall be prescribed by the State board of control.

Then came the act of 1896, approved on March 6 of that year, which, among other things, made the change that, instead of the county dispensaries remitting to the State dispensary, they were required to remit directly to the State treasurer, thus saving the two transfers from the county dispensary to the State dispensary and from thence to the treasury, and this act, in section 3, page 125, provides as follows:

> "Each county dispenser shall remit to the State treasurer all moneys accruing to the State from the sale of liquors under such rules as may be prescribed by the State board of control, and the State treasurer shall keep a separate account with said fund, from which the State board of control shall draw from time to time upon warrants, or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business. All rules

and regulations governing the said commissioner or county dispensers in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

So that, under this act, each county dispenser remitted to the State treasurer the proceeds of his sales, the State treasurer kept a separate account with said fund, the State board of control being commanded to draw from time to time therefrom, upon warrants or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business, and again provided that, in the absence of rules and regulations provided by law, the State board of control should have absolute power and authority to prescribe the same.

At the same session of the legislature, on March 9, the Twenty-second Statutes at Large, page 129, another act was passed, which reads as follows:

"An Act to Require the State Treasurer to Transmit Monthly to the State Board of Control Monthly Statements.

"SECTION 1. *Be it enacted by the General Assembly of the State of South Carolina*, That from and after the passage of this act, in order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer on the first days of each and every month to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month, and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees, together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month.

"Approved the ninth day of March, A. D. 1896."

The next year, on March 5, 1897, Twenty-second Statutes, page 540, the same provision substantially is re-enacted as in the act of 1896, also being section 3 of that act.

At the session of 1898 another act was passed, page 131, wherein section 9 provides as follows:

> "All moneys received by the county dispenser belonging to the State shall be forwarded on Monday of each week to the State treasurer, and at the same time the county dispenser shall forward to the State board of control a duplicate statement of the remittance so made to the State treasurer."

It will be observed that this provision compelled the county dispenser to remit on Monday of each week to the State treasurer and at the same time to forward to the State board of control a duplicate statement of the remittance so made to the State treasurer, thereby clearly giving to the State board of control the necessary information so that, in pursuance of the existing law, they could draw their warrants through their commissioner for the payment of the proper expenses and obligations of the institution.

The next act we find on the subject is one approved on the 13th of February, 1900, Twenty-third Statutes at Large, page 437, section 3 of which provides as follows:

> "The said board shall devise such a system of bookkeeping and accounting as it may deem advisable. The said board shall prescribe all rules and regulations, not inconsistent with law, for the government of the State dispensary and the county dispensaries."

Then came the Code of Laws of 1902, being a compilation made by order of the legislature, which was divided into two parts, part 1 being the general statutory provisions and part 2 consisting of the Code of Criminal Procedure and the Criminal Code. In this codification the only provisions in reference to the dispensary law are found in the Criminal Code, entitled "Criminal Code of South Carolina, chapter XXVII, Violation of Laws Repealing the Sale of Spirituous

Liquors," and there follow under this head a number of provisions of the various dispensary laws of force at the time of its passage. There is no express repeal in this code of existing laws not inconsistent therewith, but, on the contrary, this code contains a statement of all repealed statutes since 1882, and none of these acts which were then of force appear as so repealed, and therefore all provisions of a dispensary law of force at the time of the passage of the Code of 1902 not inconsistent therewith became and continued of force, and, as a matter of fact, up to the time of the dissolution of the State dispensary, the provisions of the law as to the deposit in a separate fund with the State treasurer and the drawing from that fund were steadfastly adhered to.

We find also in the general statutory provision of this Code, at section 706, the following:

> "In order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer, on the first days of each and every month, to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month."

This provision was simply the insertion in the codification of the act of March 9, 1896, which we have before referred to, in reference to the requirement that the State treasurer should transmit monthly to the State board of control monthly statements; and at the same session of the legislature when this criminal code was adopted, namely, on the 26th of February, 1902, Twenty-third Statutes at Large, 1103, we find the following act, entitled "An Act Relating to Dispensary Profits," previously set out in full.

It seems to us that this act, in addition to the mandatory character of the various acts under which the institution was created and continued, is the strongest expression of the legislative interpretation of the power and control of the directors of the State dispensary over the funds in its hands. It will be observed that section 1 provides that the directors of the State dispensary shall pay over to the State treasurer by January 1, 1904, in equal semi-annual installments, all of the school fund reported by them in excess of four hundred thousand dollars. In section 2 the directors are required to make quarterly settlements and commanded to pay over to the State treasurer within ten days thereafter the profits belonging to the school fund, thereby declaring, in no uncertain terms, that this fund was always kept separate and apart in the State treasury from all other funds, by a separate account, and was such a fund, solitary and alone, of all the funds so deposited, which was not subject to the warrant of the comptroller general, but was ever and always under the domination and control of the board.

It was for these reasons, therefore, and upon the proof presented at the time, that His Honor Judge Pritchard, the trial judge below in the Circuit Court, found as a fact as follows:

> "The said act also provided for a dispensary commissioner to be elected by the General Assembly and made it the duty of the board of directors of the State dispensary to purchase all alcoholic liquors for lawful use within the State, and to sell the same to the various county dispensaries, as provided in said act. The law further provided that all money arising from the sale of liquors by the board of directors of the State dispensary should be deposited with the State treasurer, to be held by him as a separate and distinct fund, and kept to the credit of the said board of directors of the State dispensary. That the liquors purchased by the said board of directors of the State dispensary should be paid for out of this fund upon a warrant to be issued by the said dispensary com-

missioner, such warrant to be issued by the dispensary commissioner at the direction of the said board of directors of the State dispensary, and no part of this fund could be lawfully paid out by the State treasurer, except upon warrants issued."

From this finding there has been no exception or appeal, and the record with such finding went to the Circuit Court of Appeals, and that court in its opinion, to be found in the record in this case at page 332 of the transcript, also found as follows:

"The act provided for a board of control of the dispensary consisting of the Governor, the Comptroller-General and Attorney-General, and to this board was committed the duty of conducting and managing the State dispensary. The business of the dispensary, under and by virtue of the act referred to, was inaugurated under the control of the agencies designated and became the only legalized method of dealing in intoxicating liquors within the State. Among other provisions of the act were that a State commissioner should be appointed by the Governor and that said commissioner should turn over monthly to the treasurer of the State the amount received from sales of liquors made by him, and the treasurer was required to keep a separate account of said fund, and the commissioner was authorized with the approval of the board of control from time to time to draw warrants upon the funds in the hands of the treasurer for the amounts necessary to pay the expenses incurred in conducting the business. It was also provided that in counties complying with the requirements of the act county dispensaries might be established and these latter were required to buy supplies of liquor from the State dispensary, and the State dispensary was required to sell to the county dispensaries supplies and intoxicating liquors at a profit of not more than fifty (50) per cent. At the outset there was appropriated by the State for the purpose of starting the dispensary system the sum of $50,000, which amount has since been repaid to the

State from the dispensary receipts. In the year 1896, the board of control was changed so that instead of being constituted as above set forth, it was made to consist of five members, to be elected by the General Assembly, each of said members being required to give a bond in the sum of $10,000, and the control and management of the dispensary was conferred by law upon them. This board, as above stated, was required to furnish liquor to the county dispensers and the latter were required to remit the net proceeds of the sale of liquor to the State treasurer. All bills for the purchase of liquor were paid by the State treasurer upon warrants drawn by the commissioner. Thus the sale of intoxicating liquors was conducted in South Carolina under the several acts of the legislature of that State and by the machinery provided for the purchase of liquors by the commissioner under the direction of the board of control of the State dispensary, etc."

From which finding of fact there has been no appeal or exception, so that in the consideration of this case today we have this fund so existing at the time of the passage of the act of the legislature, which is the subject of the present litigation, entitled "An act to provide for the disposition of all property connected with the State dispensary and to wind up its affairs," approved the 16th day of February, 1907.

Contemporaneously with the passage of this act was passed another act, by which, among other things, the State dispensary is abolished, the language of the forty-seventh section of that act being, the State dispensary is hereby abolished.

Taking up first the title of this act, let us examine it. It is entitled "An act to provide for the disposition of all property connected with the State dispensary and to wind up its affairs." The word "dispose" or "disposition" has been the subject of judicial interpretation frequently, and the authorities do not show any difference of opinion of the courts as to the meaning of the word. In Rogers *vs.* Goodwin, 2

Mass., 475, cited in Cook *vs.* Burham, 44 Pac., 447, the court says:

> "The words 'disposed of,' 'conveyed' and 'sold,' though not necessarily synonymous, are often used to properly describe the same transaction."

The first section of the act provides for the appointment of the commission, the second for its officers, and its third section makes it the duty of such commission to close out the entire business and property of the State dispensary, except real estate, and including stock in the several county dispensaries,—how? By disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. And then the section proceeds: "Said commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate."

We submit to the court no stronger words could be used to indicate the intent to transfer the title, the possession and the right to sell to this board.

The proviso again uses the word "disposed" and the clear intendment of the act is to transfer the title, if it were necessary for the purpose to do it, and to create these commissioners trustees of a trust fund to be converted in cash and to pay from such cash so ascertained the just liabilities of the institution.

T. Moultrie Mordecai,
Of Counsel for Respondents.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, and AVERY PATTON, constituting the State Dispensary Commission of South Carolina, *et al.*,
Petitioners,

vs.

WILSON DISTILLING COMPANY *et al.* and THE FLEISCHMANN COMPANY.

BRIEF OF GEORGE B. LESTER AND ALFRED S. BARNARD, COUNSEL FOR THE FLEISCHMANN COMPANY.

This case is in this Court on a writ of *certiorari* to review a decision of the Circuit Court of Appeals for the Fourth Circuit, affirming an interlocutory order of the Circuit Court for the District of South Carolina, granting an injunction and appointing receivers *pendente lite*.

Statement of Facts.

In 1892, the Legislature of the State of South Carolina passed an act prescribing the manner in which intoxicating liquors should be thereafter sold within the State. This act provided that within thirty days after its approval, the Governor should appoint a Commissioner who, under such rules and regulations as might be made by the State Board of Control, should purchase all intoxicating liquors for lawful sale within the State (Laws of South Carolina, 1892, p. 62). The State Board of Control was at first composed of the Governor, the Comptroller-General and the Attorney-General; but by subsequent amendments of the law, this Board was increased to five members, to be elected by the General Assembly (Laws of South Carolina, 1896, p. 123), and was afterwards changed to a Board of three, elected in the same manner and designated as the Board of Directors of the State Dispensary (Laws of South Carolina, 1900, p. 437)

It was the duty of the State Board of Control to appoint a County Board of Control, and the County Boards of Control were authorized, subject to the approval of the State Board, to make such rules as would be most conducive to the best management of the sale of intoxicating liquors in their respective counties (Laws of South Carolina, 1892, p. 64, Sec. 4). It was further provided that the County Board of Control should appoint County Dispensers, to whom permits might be issued authorizing them to keep and sell intoxicating liquors in various towns and villages in the respective counties as provided by law. These County Dispensers were permitted to purchase from the State Commissioner only; and the State Commissioner could make no sales except to County Dispensers, and he was forbidden to charge for liquor so sold more than fifty per cent. above the net cost thereof to the State Dispensary, which percentage of profit was, by subsequent legislation, reduced to ten per cent. Under this law the liquor

business in the State of South Carolina was conducted substantially as follows:

By the original Dispensary Law of 1892, and the various amendments thereto, the State Board of Directors and the State Commissioner purchased from distillers and dealers all liquors for lawful use within the State. The various County Dispensers, under rules and regulations adopted by the County Board of Control of the county in which such Dispenser was appointed, bought from the State Commissioner all the liquors necessary for use at his Dispensary, and sold the same to the consumer at such prices as were fixed by the County Board of Control. All the liquors sold by the State Commissioner to the County Dispensers, were paid for by the latter to the State Commissioner, and the money so received by the Commissioner was deposited with the State Treasurer. By subsequent amendment, the County Dispensers were required to remit the purchase price of the liquors sold to them by the State Commissioner, direct to the State Treasurer.

Under all the acts relating to the Dispensary system, the State Treasurer was directed and required to keep a separate account of all moneys received by him, either from the State Commissioner or from the various County Dispensers. From the fund thus created and set apart, the State Commissioner and the Board of Directors of the State Dispensary, drew from time to time such amounts as were necessary to pay for all liquors purchased from the various distillers and dealers, and for all other expenses incurred in the conduct of the business of the State Dispensary.

See,

Laws of South Carolina, 1892, p. 63.
" 1893, 431.
" 1894, 723.
" 1896, 125.
" 1897, 540.

All the profits realized by the County Dispensary for the sale of liquors to the consumer, were, under

the various acts, required to be divided equally between the County and the municipality in which the Dispensary was located. No part of these profits was ever paid into the State treasury, nor was the State by law entitled to them. The net income derived from the conduct of the State Dispensary was allowed to accumulate in the hands of the State Treasurer, and the General Assembly, from time to time, directed the disposition of the same. The State did not at any time, nor did the General Assembly, deal with, or assumed to deal with, any portion of the funds derived from the operation of the State Dispensary, except the net income or profits resulting from its operation, after all the debts and liabilities of the State Dispensary had been paid; and the fund was at all times held by the State Treasurer separate and apart from the general funds of the State, to be first applied to the payment of the debts incurred in the purchase of liquor and other expenses of the State Dispensary, and the balance or net income, if any, to be held subject to the disposition of the General Assembly, as provided in the Constitution of the State then in force.

The Constitution of 1895 restricted the appropriation or use of any part of the State Dispensary funds, except the net income or profits remaining in the hands of the State Treasurer, after the payment of the debts and the payment of the necessary running expenses (see Constitution, South Carolina, Art. 11, Sec. 12).

From and after the passage of the Act of 1892, all persons were prohibited from engaging in the manufacture or sale of any kind of intoxicating liquors within the State; and the method above described, which became known as the Dispensary System, became, and continued to be, until the passage of the two acts of 1907 hereinafter referred to, the only legitimate way of carrying on the liquor business in South Carolina.

While these laws were in force and the State Dis-

pensary was still engaged in business, the complainants sold and delivered to it in the manner provided by law, a large quantity of whiskey and other liquors. The prices at which these sales were made were entirely reasonable and mutually satisfactory, and all of the said liquors were received and accepted by the Board of Directors of the State Dispensary, who agreed to pay for the same.

At the time of the passage and approval of the Act of 1907, hereinafter referred to, all of the whiskey and liquors, the price of which the complainants are seeking to recover in this cause, had been by the State Dispensary resold, at the profit allowed by law, to the various county dispensaries, and the county dispensaries had either paid the proceeds thereof into the hands of the State Treasurer, or were indebted to the State Dispensary therefor.

In 1907, the General Assembly passed an act entitled, "An Act to declare the law in reference to and regulate the manufacture, sale, use, &c., of liquors and beverages within the State and police the same." By Section 47 of this Act, the State Dispensary was abolished, and at the same session another act was passed, and approved on February 16th, 1907, entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs."

In order to carry out the provisions of this last mentioned Act, the Governor was authorized and directed to appoint a Commission of five business men, whose duty it should be "to close out the entire business and property of the State Dispensary, * * * by disposing of the goods and property connected therewith, by collecting all debts due, and *by paying from the proceeds thereof all just liabilities at the earliest date practicable.*" It was left entirely to the Commission to make such disposition upon such terms, times and conditions as their judgment might dictate, and said Commission was authorized to return to the persons, firms and corporations from whom the

liquors had been purchased, such liquors as had been illegally bought by the former management. For the purpose of determining what liquors, if any, had been illegally bought, the Commission was authorized to make investigations as provided in said Act.

Within a short time after the passage and approval of this Act of 1907, providing for the winding up of the affairs of the State Dispensary, the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton were appointed Commissioners, and said defendants having duly qualified and organized pursuant to said Act, became, and at the time of the institution of this suit, were and do now constitute the State Dispensary Commission, and as such are charged with the execution of all the powers conferred, and the performance of all duties imposed by said Act.

Immediately upon their qualification as Commissioners and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and at once took possession and control of the entire business and property, excepting the real estate, of the South Carolina State Dispensary. The property which passed into the hands of the Commission from the Board of Directors of the State Dispensary by virtue of the Statute of 1907, consisted of cash in the hands of the State Treasurer amounting to about $150,000, the various accounts payable by the County Dispensaries to the State Dispensary, and large quantities of alcoholic liquors on hand, which the State Dispensary had not sold. The liabilities consisted almost entirely of accounts due to various distillers and liquor dealers throughout the country, for alcoholic liquors which had been sold by them to the State Dispensary, and for which the State Dispensary was indebted. The cash balance of about $150,000, which was in the hands of the State Treasurer to the credit of the Board of Directors of the State

Dispensary was turned over to the defendants, placed by them to their credit in bank, and constitutes a part of the fund now in their hands. The said defendants have, in accordance with the Act providing for their appointment, sold all the property of the State Dispensary authorized by said Act to be sold, and have collected all of the debts due to it, and the moneys realized from such sale and collections, have been from time to time, as received by said defendants, deposited to the credit of the State Dispensary Commission in various banks; and there was at the commencement of this suit, and now is or ought to be, less such sums as have been, by orders made in this cause, withdrawn, in said banks to the credit of the said Commission, and subject to withdrawal by it only, about $834,000. All of this sum is in the possession and control of the said defendants; no part of it is in the State Treasury, nor has any of it ever been mingled with any of the funds belonging to the State of South Carolina.

At the time the defendants took possession of the property of the State Dispensary, there was on hand as part of the large quantities of whiskeys and other liquors which had been bought from various individuals, firms and corporations, a quantity of whiskey and other liquors which had been purchased from The Fleischmann Company, and the defendants thereupon requested said Company to take back such goods as had been purchased from it and which had not been sold by the State Dispensary, and held out to The Fleischmann Company as an inducement for so doing that it would enable the Commission to more rapidly dispose of the goods on hand, and would facilitate a settlement of the affairs of the State Dispensary, and enable the Commission to make a much earlier payment of its liabilities. Thereafter The Fleischmann Company furnished to the Commission at its request an itemized statement of the accounts held by it against the State Dispensary, and the Com-

mission notified said Company that there was a discrepancy between the amount claimed by said Company, and the amount shown to be due by the books of the Dispensary, of $292.14, and claimed that the State Dispensary was entitled to a credit of that amount, at the same time stating that the account furnished by The Fleischmann Company had been audited, and that it corresponded substantially with the accounts kept by the State Dispensary, and that if the said Company would take back the goods above referred to, and give the State Dispensary credit for the said sum of $292.14, there would remain due and owing to The Fleischmann Company the sum of $66,561.19, which sum the Commission agreed to pay. That in consideration of the agreement and promise of the Commission to pay this amount, The Fleischmann Company took back all of the goods remaining on hand, and gave credit therefor at the invoice prices, and allowed the Commission a credit of the $292.14.

Thereafter said The Fleischmann Company made frequent applications to the Commission for the payment of its claim, but notwithstanding the defendants have realized from the sale of the property of the State Dispensary, and from the collection of the debts due to it, and have to their credit in bank together with the sum which had been received from the State Treasurer, the sum of about $834,000, which was more than sufficient to pay the claims of all the creditors and all liabilities of the State Dispensary, the Commission declined and refused to pay the claim of The Fleischmann Company or of any other creditor.

Thereafter and on the 23d day of January, 1908, The Fleischmann Company filed its bill of complaint (Record, p. 17), on which a notice to show cause was issued, returnable before the United States Circuit Court Judge at Asheville, North Carolina, on January 29, 1908 (Record, p. 29), and on the following day, it having been made to appear to the Court that the Commission threatened to divert the funds,

a restraining order was issued (Record, p. 23). On the return day of this notice to show cause, the defendants constituting the State Dispensary Commission, appeared in this action by J. Fraser Lyon, Attorney General of the State of South Carolina, as their counsel, and filed what was designated as a return, in which they attacked the jurisdiction of the Court, and answered generally to the allegations of the bill (Record, pp. 41–51). After argument, and on February 29, 1908, the United States Circuit Court handed down its decision and entered an order directing that an injunction *pendente lite* should issue in accordance with the prayer of the bill (Record, p. 86); the opinion of the Court upon the question involved being filed on the 5th day of March, 1908 (Record, p. 88).

On the 19th day of February, 1908, the Wilson Distilling Company and others, who had theretofore brought suit against the Dispensary Commission, filed an amended and supplemental bill (Record p. 105), on which a notice to show cause was issued, returnable on the 29th day of February, 1908 (Record, p. 122), and the hearing on this motion was postponed until March 7th, 1908 (Record, p. 143). It having been made to appear to the Court on March 6th, 1908, that there was danger of the fund in the hands of the Commission being diverted, an order was entered appointing temporary receivers (Record, p. 189), and on the hearing on the following day, the two causes of the Wilson Distilling Company and the Fleischmann Company were consolidated, and upon the evidence in both causes, the Court ordered that an injunction *pendente lite* should issue, and appointed permanent Receivers to take charge of and administer the funds in the hands of the Commission (Record, p. 190). From this order an appeal was taken to the United States Circuit Court of Appeals, and the order was affirmed, the opinion appearing in this Record on page 331.

It further appears from the Record that after this suit had been commenced in the United States

Circuit Court, and after the Circuit Judge had announced his decision, the General Assembly of the State of South Carolina did on the 24th day of February, 1908, pass an act appropriating the sum of $15,000 to meet the expenses of certain criminal prosecutions that had been commenced against certain persons charged with violations of the State Dispensary law, and directed that the said sum of Fifteen thousand dollars should be paid into the State Treasury by the State Dispensary Commission "out of any funds in its hands arising from the business or property of the State Dispensary" (Laws of South Carolina, 1908, p. 1369, 1370). Thereafter and on the 27th day of March, 1908, J. Fraser Lyon, the Attorney General of South Carolina, as petitioner, filed a petition for a writ of mandamus in the Supreme Court of the State of South Carolina, against W. J. Murray and others, constituting the State Dispensary Commission, in which proceeding the petitioner prayed that an order should be issued from the Supreme Court requiring the Dispensary Commission to turn the sum of $15,000 into the State Treasury of the State of South Carolina, in accordance with the terms of the Act appropriating the same, above referred to (Record, p. 232). The Dispensary Commission appeared by W. F. Stevenson, their attorney, who also appears as counsel for the Commission in this suit, and filed a return setting up the various injunction orders issued by the United States Circuit Court in this action, and claiming that the Commission could not by reason of the injunction pay out any of the funds in its hands (Record, p. 235). Upon this petition, and the return of the defendants, and the traverse to said return, the Supreme Court of South Carolina rendered a decision construing the Act of February 16, 1907, providing for the winding up of the affairs of the State Dispensary, and holding that this suit was in effect a suit against the State of South Carolina, and that the injunction orders issued herein were void and of no

effect, the United States Circuit Court having no jurisdiction (Record, pp. 280–296).

Thereafter a motion was made before the United States Circuit Court to vacate the order continuing the injunction and appointing Receivers. This motion was heard on the 27th day of March, 1908, and was denied (Record, pp. 298–301). On the same day an order was entered directing the Dispensary Commission to pay to the Attorney General of South Carolina the sum of $15,000, upon his application therefor (Record, p. 307).

It further appears from the record that after the filing of the bill in this cause and the issuing of a temporary restraining order, the defendants appeared by J. Fraser Lyon, Attorney General of South Carolina, and moved that they be allowed to pay out of the funds in their hands a sum sufficient to pay the necessary expenses incurred in the administration of the said fund, not exceeding the sum of $15,000, on which motion an order was made in this cause directing said payment (Record, p. 41).

Thereafter, on the 5th day of March, 1908, the defendants again appeared and joined in the petition of various creditors, whose claims the Commission had compromised, to be allowed to pay the amounts which said Commission had agreed to pay said creditors respectively in settlement of their claims (Record, pp. 156–171). Thereupon an order was made directing said payment (Record, p. 172). On November 18th, 1908, a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals in this cause was filed in this court, which petition was allowed.

The several assignments of error of the petitioners present three questions.

> First; Does the Act of the General Assembly of the State of South Carolina of February 16th, 1907, create a trust and divest the State of the title and control of the State Dispensary property?

Second; Is this a suit against the State of South Carolina?

Third; Is the State of South Carolina an indispensable party to this suit?

ARGUMENT.

1. THE ACT OF FEBRUARY 16, 1907, PROVIDING FOR THE DISPOSITION OF ALL THE PROPERTY CONNECTED WITH THE SOUTH CAROLINA STATE DISPENSARY AND TO WIND UP ITS AFFAIRS, CREATED A TRUST, AND THE FUNDS IN THE HANDS OF THE COMMISSION ARE A TRUST FUND HELD BY THEM FOR THE BENEFIT OF THE CREDITORS OF THE STATE DISPENSARY.

By an Act of the General Assembly of the State of South Carolina, passed concurrent with the Act creating the Dispensary Commission, the State Dispensary was abolished (Sec. 47, Laws of South Carolina, 1907, p. 480). The Act creating the Dispensary Commission is set forth in full in the bill of complaint (Record, pp. 18–20). By the terms of this Act the Governor was directed to appoint a Commission consisting of five members, to be known as the State Dispensary Commission. This Commission was directed to organize by the election of a Chairman and a Secretary from their number. The term of office of this Commission is not stated in the Act. The Act declares that it shall be the duty of the Commission to close out the entire business and property of the State Dispensary, except the real estate (including the stock in the several county dispensaries), by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liabilities at the earliest date practicable. It was left to the judgment of the Commission to decide when and upon what terms and conditions the property should be disposed of, the only restrictions being that no alcoholic liquors should be disposed of by the Commission within the

State of South Carolina, except to County Dispensary Boards; and that all liquors which had been illegally bought by the former Board of Directors of the State Dispensary might be returned to the persons, firms or corporations, from whom purchased. The Commission was given full power and authority to investigate the past conduct and affairs of the State Dispensary, and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, 1906.

The Committee referred to in this Act was a Committee appointed by the Legislature to investigate the alleged misconduct of the former Boards of Directors and officials of the State Dispensary. The Commission was given no power to investigate or pass upon the legality or illegality of the claims of the creditors, except in so far as those claims related to goods remaining in the hands of the Dispensary Board at the time the State Dispensary was abolished, which unsold goods had come into the hands of the Dispensary Commission by the Act appointing them. The Act provided with reference to such unsold goods as follows:

> "SECTION 3 All liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, *and in determining the legality of the said purchases* they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors," &c.

As has been seen, the property which came into the hands of the Commission, aside from the cash which was turned over to it by the State Treasurer, consisted of accounts payable to the State Dispensary from the various county dispensers, together with the unsold liquors remaining on hand at the time the Commis-

sion took possession, and the liabitities were the amounts due and owing to the creditors. As to the liquors which had been sold by the old Boards of Directors to the various county dispensaries, these had all been sold at a profit, and were represented by the accounts payable. The State had no further interest in the identity of these goods or their disposition, or as to whether or not the transaction as between the distillers or dealers from whom they had been purchased and the old Board of Directors was legal or illegal. The goods had been sold and the profits had been made by the State Dispensary. The parties could not be placed in *statu quo*. The Dispensary had been abolished with its Board of Directors and Commissioner, and the identity of the goods had been merged into debts against the County Dispensers, which debts were by the Act made payable to the Commission. As to the goods on hand, however, the Commission held the property, although the same may have been duly purchased according to law, and the State Dispensary was justly indebted for the payment of the purchase price of the same to the distillers and dealers. As to these goods, they were authorized to investigate the legality of their purchase, the object being if such goods had not been purchased according to the requirements of the law, or fraud had been practiced upon the former Boards of Directors of the Dispensary, that defense could, to the extent of the goods remaining, be interposed by the Commission to any action brought by a distiller or dealer for the recovery of their purchase price. When, as occurred in this case, The Fleischmann Company took back without question all unsold goods for the purpose of facilitating the liquidation of the Dispensary affairs, nothing remained to be done by the Dispensary Commission but to bring into reconciliation the accounts of the Company with the Dispensary books, and this having been done (as admitted by the defendants in their return before referred to), there was nothing left but the plain ministerial

duty on the part of the Commission to pay this Company's debt.

The same practice as to the return of unsold goods was adopted in the case of every creditor. The Commission returned the goods which they could not sell to the County Dispensers, converted the remainder into cash, collected all the debts due and owing from the various County Dispensers throughout the State, and completed the liquidation of the Dispensary property in accordance with the provisions of the Act.

The fund resulting from this liquidation was made up entirely from a sale, by the old State Dispensary Boards and by the Dispensary Commission, of liquors to the County Dispensers throughout the State, all of which liquors had been supplied by the very creditors who are now seeking in this suit to obtain payment of the agreed purchase price of the same.

Under the provisions of the Act the Commission has held and now holds this fund for two purposes. First, for the payment of the liabilities and the expenses of the liquidation; and, second, to pay to the State Treasurer, after all liabilities and expenses have been paid, the surplus, if any, Section 5 of the Act providing: "The said Commission shall pay to the State Treasurer, after deducting their compensation and all other expenses allowed by this Act, all surplus funds on hand, after paying all liabilities." It will be observed that the Act does not authorize the withdrawal, by the State Treasurer or any State official, of any portion of these funds, but provides that the Commission, which has title and ownership for the purposes of the Act, shall, after all liabilities have been paid, pay to the State Treasurer any surplus. The State of South Carolina has no present right in any of the funds in the hands of the Commission, and can have no right to any of the funds until all the liabilities have been paid. A reference to the former Acts creating and continuing the Dispensary system in the State of South Carolina, will

show that at no time since the establishment of the Dispensary, has the State had any authority or control over the property or corpus of the Dispensary funds until after all the debts and liabilities had been paid, when, under the former acts, the General Assembly was entitled to dispose of the net income or profits of the institution. At all times the general fund resulting from the operations of the State Dispensary was subject to withdrawal from the depositary by the State Board of Control and later by the Board of Directors of the State Dispensary for the purpose of paying the debts and liabilities and expenses of operation of the State Dispensary. No part of such funds except the net profits was ever subject, under any of the dispensary laws, to the control of the State or State officials. The creation of the defendants as a State Dispensary Commission, and the direction that they should pay out of the Dispensary property coming into their hands all of the just liabilities of the State Dispensary, was but a continuation of the previous policy of the State to set aside the Dispensary funds to be used primarily for paying all debts incurred in conducting the Dispensary system.

It is clear that if an individual debtor had by a written instrument similar in terms to the Act of 1907, creating the Dispensary Commission, placed property or funds in the hands of another to be used as directed in said Act, the persons in whose hands the property or fund was placed would become a trustee. If we eliminate then all of the foreign matter which has been dumped into this case, get rid of the political features of it, and shut out the hue and cry about State rights, it will be seen that this is a plain every-day suit in equity, brought by a *cestui que* trust, to compel a trustee, holding property for his benefit, to perform the duties imposed upon him by the instrument creating the trust; a suit brought solely for the purpose of settling a dispute between a *cestui que* trust and a trustee as to the amount legally

due to the *cestui que* trust out of the funds in the hands of the trustee. The only novel feature in this case, and that is more apparent than real, is that the trust was created by a State. But this is not new and involves no new principle, as it has been frequently held that a State or sovereign can create a trust and that a trust so created is enforceable in a court of equity.

Perry of Trusts, 5th Ed. Sec. 30.

Beach on Trusts and Trustees, 1897 Ed. Sec. 3.

Commissioners *vs.* Walker, 6 How. (Miss.) 143.

Board of Liquidation *vs.* McComb, 92 U. S. 541.

Chaffriax *vs.* Board of Liquidation, 11 Fed. 638.

Swasey *vs* N. C. RR. Co., 23 Fed. Cas. 518.

The same principle is clearly recognized in Louisiana *vs.* Jumel, 107 U. S. 711.

Vose *vs.* Internal Improvement Fund, 28 Fed. Cas. 1226.

Ford *vs.* Delta & Pine Land Co., 164 U. S. 662.

As was said by this Court in McKee *vs.* Lemon, 159 U. S. 317, "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which may be enforced by a bill in equity if not by an action at law. The acceptance of money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor."

See also

Bearing *vs.* Dabney, 16 Wall. 1.

Clews *vs.* Jamieson, 182 U. S. 461 (479, 480).

In Gibbs *vs.* Green, 54 Miss. 592, the Supreme Court of Mississippi, in discussing the enforcement of a legislative act directing that certain taxes should be raised upon land which had been benefitted by the construction of a levee in that State, held that the taxes which had gone into the hands of the Commissioners appointed to collect the same was a trust fund, and that the act created between the State and the holders of certain bonds which had been issued for the purpose of obtaining the money for constructing the levee an inviolable contract, and declared that so long as the Court could find persons or machinery by which such an obligation could be enforced, no measures would be left untried to compel performance.

"It is true that cases have arisen where, owing to peculiar facts and circumstances, it has been found impossible to administer relief, but this occurred solely because there were no functionaries upon whom the Court could act." The Court further held that the fact that the Levee Commissioners and their successors, the Auditor and State Treasurer, were vested by the Act with power to sell the land, did not divest the Court of Chancery of its inherent jurisdiction to administer the trust fund for the benefit and upon the application of the *cestui que trust.*

The principle of this case was approved by this Court in Ford *vs.* Delta and Pine Land Co., 164 U. S. 662 (675).

In the case of Maenhaut *vs.* City of New Orleans, 2 Woods, the General Assembly of Louisiana passed an Act providing for a commission of five officers of the City of New Orleans, called the Commissioners of the Consolidated Debt of New Orleans. These Commissioners were authorized to issue bonds of the City and to exchange these bonds for any of the old obligations or debts of the municipality, or to sell the same, and with the proceeds, pay off the debts. The Act further provided for the levying of a special tax on real estate, to be called the Consol-

idated Loan Tax and directed that these taxes should be applied to the interest on the bonds.

A suit was brought by one of the bondholders to enjoin the City from using the money and to have the same applied to the purposes for which it was collected. ——Woods, Circuit Judge, issued the injunction, and in the course of his opinion said: "In my judgment there is no doubt that the City can be enjoined. The money especially collected to pay this interest is deposited in bank to the credit of the fund for that purpose, and having been especially collected under authority of the law to pay this interest, and deposited in bank to the credit of a fund set apart for such payment, it is held by the City in a fiduciary capacity, and a trust is imposed upon the City to apply the funds to the object for which they were collected. It is a trust which equity can enforce." It was further held that "A Court of Chancery will always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity."

But it is further contended, in this case, that the members of the State Dispensary Commission are officers of the State of South Carolina. They were certainly no officers prior to their appointment as Commissioners, and it is plain that the Act of 1907 does not make them officers. The trust was reposed in them not as officers of the State, but as individuals. The Act fixed no time during which they should hold their positions, nor were they required to take an oath of office.

The Constitution of South Carolina, Article 3, Section 26, provides that all members of the General Assembly, "and all officers, before they enter upon the duties of their respective offices, shall take and subscribe the following oath" &c.; and by Article 1, Section 2, of the said Constitution, it is provided that "The terms of all officers shall be for some specified period, except Notaries Public and officers in the militia."

It is obvious that the Act intended that the Commission should be composed of business men, appointed for the purpose of winding up a business institution according to the ordinary methods of liquidation. The Act created the trust and left it to the Governor to appoint the Trustees. These Trustees were appointed primarily to look after the interests of the creditors, as they were required to pay all just liabilities at the earliest date practicable.

The appellants further contend that in the construction of the Act of 1907, this Court is bound by the decision of the Supreme Court of South Carolina, construing said Act, and that that Court having held that by the said Act the State of South Carolina did not divest itself of the title and possession of the funds in the hands of the Commission, this Court must follow that decision.

The record shows that this decision was rendered in a proceeding in the Supreme Court of South Carolina to which these complainants were not parties, and after the complainants had filed their bills in the United States Circuit Court for the District of South Carolina, and that court had taken jurisdiction and construed the Act of 1907. The complainants were therefore entitled to the independent judgment of the United States Circuit Court in construing that Act; and this case is not within the rule which requires this court to follow State decisions in the construction of State statutes.

Pease *vs.* Peck, 18 Howard, 595.

Burgess *vs.* Seligman, 107 U. S. 20 (33).

Carroll County *vs.* Smith, 111 U. S. 556.

Anderson *vs.* Santa Anna Trp. Co., 116 U. S. 356.

Pleasant Improvement Co. *vs.* Ætna Life Ins. Co., 138 U. S. 67.

These cases are all cited with approval in a very exhaustive opinion on this question, delivered by Mr. Justice Harlan in the case of Great Southern Hotel Co. *vs.* Jones, 193 U. S. 533, and in this case it is said, "The only exception to the general rule announced in the above cases arises when the qestion is whether a particular statute was passed by the Legislature in the manner prescribed by the State Constitution so as to become a law of the State."

See also, Wicomico County *vs.* Bancroft, 203 U. S. 112.

All the cases cited by the petitioners, to the effect that this Court must follow the construction placed by the Supreme Court of the State upon State statutes, were writs of error direct from the State courts to review the decision in which the statute was construed, and therefore have no application.

3. THIS IS NOT A SUIT AGAINST THE STATE.

The foregoing authorities establish beyond question that the fund in the hands of the State Dispensary Commission, out of which the complainants are seeking to have their debts paid, is a trust fund, and we come to the next question as to whether or not a suit to enforce this trust is a suit against the State of South Carolina.

The State is not a party, nor are the complainants seeking any relief against it. The only theory upon which it can be said that this is a suit against the State is that the defendants, constituting the State Dispensary Commission, are officers of the State, and that a suit against them is a suit against the State.

This suit is brought by the complainants as creditors of the State Dispensary to compel the defendants to perform specific duties which the Legislature of the State has directed them to perform. The purpose of the suit is not to require the

defendants to do that which the law of the State forbids, but to compel them to do what the statute says they shall do.

Ralston *vs.* Crittenten, 120 U. S.

"The Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is of necessity limited to those suits in which the State is a party to the record. In deciding who are parties to a suit the Court will not look beyond the record. Making a state officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest."

Osborne *vs.* Bank, 9 Wheaton, 738.
Davis *vs.* Gray, 16 Wallace, 220.
U. S. *vs.* Lee, 106 U. S. 196.
Board of Liquidation *vs.* McComb, 92 U. S. 541.

It may be contended that this doctrine has been modified in more recent cases in which it is declared that the Court will, in determining who are the real parties to the suit, look beyond the record; as in the cases of

Louisiana *vs.* Jumel, 107 U. S. 711.
Cunningham *vs.* Macon &c. R. R. Co., 109 U. S. 455.
Hagood *vs.* Southern, 117 U. S. 70.
In re Ayres, 123 U. S. 492.

But there is a broad distinction between those cases and the case at bar. In those cases there was no trust created, and there was no specific fund which the complainants were seeking to reach.

It will be noted here, that the state is not claiming any interest in the fund in the hands of these defendants, and in order to enforce the trust

imposed by the Act of 1907, the State is neither a necessary nor indispensable party.

Pennoyer *vs.* McConnaughy, 140 U. S. 1.

Swasey *vs.* N. C. R. R. Co., 23 Fed. Cas. 518.

Chaffraix *vs.* Board of Liquidation, 11 Fed. 632.

Tindell *vs.* Wesley, 167 U. S. 220.

The case of Louisiana *vs.* Jumel (*supra*), on which the appellants so strongly rely, was a suit brought against the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State and Speaker of the House of Representatives of the State of Louisiana, to compel them, as constituting the Board of Liquidation of that State, to apply certain money in the treasury to the payment of the interest coupons on certain State bonds. In 1874 an Act had been passed providing for the issue of bonds, and the collection of taxes with which to pay the interest on said bonds; but it will be observed that no duty with reference to the fund raised from such taxes and the payment of the interest coupons was imposed upon the Board of Liquidation; nor were they the custodians of the funds.

On January 1, 1880, a new constitution went into effect in Louisiana, by which it was provided that the coupons falling due on January 1, 1880, should be remitted and any interest taxes collected to meet said coupons were transferred to defray the expenses of the State Governor, and at the time the suit was instituted the fund was in the treasury. It was held that the suit could not be maintained because the defendants were charged with no duty with respect to the fund sought to be reached. "The individual defendants are the several officers of the State who under the law compose the Board of Liquidation. That Board is in no sense a custodian of the fund. It had nothing to do with levying the tax, collecting the money, paying it out, &c.

The case is distinguished from Bd. of Liq. *vs.* McComb, 92 U. S. 531, "which," says the Court, "arose under the same Act of 1874 that we are now considering; the Board of Liquidation was enjoined at the instance of bondholders from admitting to the privileges of the compromise proposed by the State certain persons other than those originally provided for and on different terms, but this clearly because the Board of Liquidation was by the very terms of the law charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every *bona fide* bondholder by accepting the compromise offered became personally interested in securing the due administration of the trust which had thus been committed to the Board. In fact, the Board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust and might act accordingly.

In this case, however, there is no such trust. As has already been said, the Board is charged with no duty in respect to the taxes, &c. * * * The law has never made it a part of their official duty to separate from the other moneys in the treasury that which was realized from the taxes in question and hold it in trust for the bondholders."

This was an effort to compel the State officers to do that which they were by law expressly prohibited from doing.

"But it has been well settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the

writs of mandamus and injunction are somewhat correlative to each other."

Bd. of Liq. *vs.* McComb, 92 U. S 531,
Pennoyer *vs.* McConnaughy, 104U. S. 1.

This distinction is also drawn in the two cases of Swasey *vs.* N. C. RR. Co., *supra,* and Christian *vs.* A. & N. C. RR. Co., 133 U. S. 233.

In the first case, the State of North Carolina had authorized the issue of certain bonds with which to build the North Carolina Railroad; it became a subscriber to the capital stock of the Railroad Company to the extent of the money put in, and as security for the bonds pledged the stock. While this stock was still in the hands of the corporation, and before it had been issued to the State, a suit was brought by the bondholders on whose bonds the interest had not been paid, to foreclose the lien on the stock, and to apply the dividends belonging to the State to the payment of the interest. The case was heard before Chief Justice Wait at Circuit, who, it will be noted, delivered the opinion in the Jumel case (*supra*), and he decided that the property, not having gone into the State Treasury, and it being still in the hands of the original pledgee, the suit to enforce the pledge was not a suit against the State of North Carolina.

In the Christian case (*supra*), which was based upon a very similar state of facts, the stock had been issued to the State and was in the State Treasury; and in order to transfer the stock to any purchaser who might buy at a foreclosure sale, it was necessary to have the State, which was the owner of the stock, before the Court. Following the decision in the case of Cunningham *vs.* Macon, &c., R.R. Co., *supra,* this Court held that inasmuch as the title to the property was in the State, and no transfer could be made without the presence of the State, the suit was in effect against the State, and could not be maintained.

This was also the case in Cunningham *vs.* Macon, &c., R.R. Co., *supra.* There a suit was brought

to foreclose a mortgage on certain property, the title to which was in the State of Georgia, and this Court held that no transfer could be made without the presence of the State, which held the legal title, and therefore the suit was within the inhibition of the Eleventh Amendment.

The cases on this subject have been recently cited and commented upon by this Court in the Matter of Edward T. Young, 209 U. S. 158, in which this Court held that a suit to enjoin the Attorney-General of the State of Minnesota from prosecuting criminal actions for violation of a law fixing railroad rates within the State, was not a suit against the State. If a suit against the Attorney-General of a State to restrain him from doing what the law of the State expressly requires he shall do is not a suit against the State, how can it be contended that a suit to compel a trustee appointed by the State to perform a ministerial duty is a suit against the State within the Constitutional amendment? But the defendants, as heretofore argued, are not officers of the State. They are simply agents, if anything, appointed solely for the purpose of carrying out specific duties. They are certainly not general officers of the State in such a sense that a suit against them is a suit against the State within the inhibition of the Eleventh Amendment.

Western Union Tel. Co. *vs.* Myatt, 98 Fed. 335.

Affirmed, Atlantic C. L. RR. Co. *vs.* Virginia Corporation Commission, 211 U. S.

3. Is the State an Indispensable Party?

The State is not claiming any interest in the fund in the hands of the Commission, nor is it entitled to any part of the fund until all of the just liabilities of the old State Dispensary are discharged, and the expenses incident to the carrying out of the Act of 1907 deducted. The only suggestion of an interest in the State comes from the petitioners

themselves, who, in their so-called return, contend that they hold the money as the property of the State. But it is well settled that if the State is not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction, even though some interest of the State may be affected by the decision.

United States *vs.* Peters, 5 Cranch, 136.
Louisville, &c., RR. Co. *vs.* Leston, 2 Howard, 551.
Bank of U. S. *vs.* Planters Bank of Ga., 9 Wheaton, 904.

And certainly it cannot be alleged that a mere suggestion of title in the State of property in the possession of an individual must arrest the proceedings of the courts, and prevent their looking into the suggestion and examining the validity of the title.

Tindell *vs.* Wesley, 167 U. S. 220.

See also,

Gunter, Attorney-General, &c. *vs.* Atlantic C. L. RR. Co., 200 U. S. 273.

The test of indispensable parties, as was said by this Court in Horn *vs.* Lockhart, 17 Wallace. 579, is whether their interests are so interwoven and bound up that no decree could be made without necessarily affecting them; and it is only the presence of parties thus situated which is essential to the jurisdiction of the Court. The question is, or always should be, whether to a decree authorized by the case presented, the party who is not before the Court is an indispensable party, for if the interests are severable, and a decree without prejudicing that party's rights can be made, the jurisdiction of the Court should be retained.

In Elmendorf *vs.* Taylor, 10th Wheat, 152 (166-167), Chief Justice Marshall, discussing the question of necessary parties to a suit in equity, uses this language:

"Courts of Equity require that all the parties concerned in interest shall be brought before them

so that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself and is subject to its discretion. It is not, like the description of parties, an inflexible rule a failure to observe which turns the party out of court because it has no jurisdiction over the cause, but, being introduced by the Court itself for the purposes of justice, is susceptible of modification for the promotion of those purposes. In addition to these observations, it may be proper to say that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable in most cases to the courts of the United States, is not applicable to all In the exercise of its discretion the Court may require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the Court cannot reach, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's suit because he has not done that which the law will not enable him to do."

Could there be a case to which this rule, adopted in the interest of justice, is more applicable than the case at bar? The law will not permit the State of South Carolina to be sued. The State, recognizing the obligation of the State Dispensary to the complainants and others from whom the Dispensary Agent has purchased goods, from the sale of which a profit has been realized, determines to treat fairly all creditors holding just liabilities. To this end it placed in the hands of the defendants, commissioners, sufficient property with which to pay all the debts of the State Dispensary, and directed that the proceeds arising from the sale of the property should be so applied. The commissioners refuse to carry out this direct command of the State. Is it possible that a Court of Equity, having full power

to adjudicate all questions at issue between the parties before the court, will refuse to entertain the suit, leave the complainants remediless and permit a great injustice to be done upon the mere suggestion of the defendants that the State has an interest in the fund and should be made a party, when the State itself, although ample opportunity has been afforded it so to do, refuses to intervene and set up its interest and when to make the State a party without its consent would defeat the jurisdiction of the court? The Attorney General of the State appears upon the record as counsel for the commissioners. If this did not in effect make the State a party what more could the State do to protect its interest even if it were actually a party by name? In this case the State clearly belongs to that "class of persons having such relations to the matter in controversy merely formal or otherwise, that while they may be called proper parties the court will take no account of the omission to make them parties," or to that other "class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court it will require them to be made parties if within its jurisdiction before deciding the case. But if this cannot be done it will proceed to administer such relief as may be in its power between the parties before it."

But even if it be conceded that the State has an interest in the fund in the hands of the Commission, it is an interest subordinate and secondary to the rights of creditors holding just liabilities. It is not, therefore, that kind of interest which must be represented before the court and the absence of which representation will prevent the court from deciding as between the complainants and the defendant commissioners what are the just liabilities of the State Dispensary which ought to be paid under the provisions of the Act of 1907.

In Dandridge *vs.* Washington's Executors, 2 Pet. 370, a will had been executed providing for the education of certain nephews of the testator. Among other things, the will provided that after the testator's debts and legacies had been paid, and the education of the nephews completed, the residue of

the estate should be equally divided between certain persons thereafter named. A suit was brought by one of the nephews to compel the executors to contribute more than they were contributing towards his education and support. It was contended that the bill should be dismissed, because the residuary legatees were necessary and indispensable parties. In dealing with this contention, Chief Justice Marshall, delivering the opinion of the Court, said:

"In a suit for the distribution of this fund, we do not think the residuary legatees necessary parties. They have undoubtedly an interest in reducing the sums to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks to the residuum, and that residuum is diminished as well by the claims of creditors and specific legacies as by this. In all such cases the executors represent the residuary legatees and guard their interests. It is a part of their duty which requires them to protect the interest of the estate. In such suits the residuary legatees are never made parties."

This case is clearly analogous to the case at bar. The principal reason suggested for the contention that the State should be made a party, is that the State is entitled to the surplus after all the just liabilities and expenses are paid, and it is to the interest of the State to keep down these payments as much as possible. We think that the State in this instance occupies exactly the position of the residuary legatees in the decision referred to, and that the interest of the State is represented by the Commissioners just as the interest of the residuary legatees was held to be represented by the executors. We do not however, admit that there appears anywhere in the Act of 1907 anything which would justify the assumption that the State of South Carolina desires to have the payment of the just liabilities as small as possible. On the contrary it is clear from the Act that the State desires that all of the just liabilities should be paid, and the only question with which the State is concerned is whether or not a liability is just. Certainly it cannot be contended that in the decision of this question

the court will not fully protect the interest of the State, or that the State will not have the opportunity to protect its own interest through the defendants. All the evidence which the State has tending to show that any of the claims made against the fund are not just may be furnished to the defendants and used by them in resisting the payment of the claim. It is perfectly clear, therefore, that the interests of the State will be fully protected, and that as between the parties litigant the court can render a final decree which will not injuriously affect the State, but which on the other hand will do full equity between the State and the creditors for the payment of whose debts the State has provided a fund. As was said by the learned Judge who delivered the opinion of the Circuit Court of Appeals, "It is the peculiar province of courts of equity to administer trusts. Indeed it is a familiar saying that 'equity loves a trust', and that it will not permit a trust to fail for the want of a trustee. In a court of equity, which is a forum of conscience, the shortcomings of the law can be supplied, and every interest and right can be protected and administered, so as to insure exact justice. The proceedings in these courts are of such a character as to be most conducive to the ascertainment of truth, and besides this, a chancellor may, if he deems it expedient, be aided in determining a difficult issue of fact by calling to his assistance a jury on the law side of the docket."

Murray *vs.* Wilson Distilling Co., 164 Fed. 1 (22)

See also,

Payne *vs.* Hook, 7 Wallace 425.
Hotel Co. *vs.* Wade, 97 U. S. 13.

There has been much discussion in this case of the very interesting question as to how far the Eleventh Amendment protects a State against a suit to enforce the payment of a debt contracted outside of its sovereignty. A decision of this question is not essential because the suits of complainants are fully sustained by the ordinary principles of equity applicable to the administration of trusts. But if we must construe the Constitution in the light in which it presented itself to the framers, it may well be

doubted if the Eleventh Amendment affords any protection against such a debt. The purpose of the Amendment was to protect the State in the exercise of those functions which pertain to its sovereignty, and while a State may have the power to engage in business in competition with its citizens, it is inconceivable that the framers of the Eleventh Amendment ever contemplated that a State might engage in business, contract debts in the purchase of property used to carry on the business, sell the property, so purchased, at a large profit, put the money realized from the sales into its Treasury, and when called upon to pay plead the Eleventh Amendment, and say to the creditors, whose property it has taken, you cannot enforce your just claims by suit, and therefore you must accept such part of your debt as the State is inclined to pay or get nothing. This would, indeed, change the amendment from a shield to a sword. That it it was not so intended, and that the State is amenable to the law whenever it engages in business outside of its sovereignty, is clearly established by this Court in a decision to which this very State was a party, and in which this very business and institution were involved.

South Carolina *vs.* United States, 199 U. S. 437.

Upon the foregoing authorities, this Court has settled all of the questions propounded in the outset against the contention of the petitioners. The decision of the Circuit Court of Appeals, presided over by the learned Chief Justice of this Court, affirming the decision of the Circuit Court for the District of South Carolina, and holding that the defendants are Trustees, and the fund in their hands a trust fund, that this is not a suit against the State of South Carolina, and that the State of South Carolina is not an indispensable party, was correct and should be affirmed.

Respectfully submitted,

GEORGE B. LESTER, and
ALFRED S. BARNARD,
Counsel for The Fleischman Company.

MURRAY, McSWEEN, AND PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, *v.* WILSON DISTILLING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 625. Argued February 26, March 1, 1909.—Decided April 5, 1909.

Purchases made by state officers of supplies for business carried on by the State are made by the State, and suits by the vendors against the state officers carrying on or winding up the business are suits against the State and, under the Eleventh Amendment, beyond the jurisdiction of the Federal courts; and so *held* as to suits against commissioners to wind up the State Liquor Dispensary of South Carolina.

A bill in equity to compel specific performance of a contract between an individual and a State cannot, against the objection of the State, be maintained in the Federal courts. *Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233.

A state statute will not, by strained implication, be construed as a divestiture of rights of property, or as authorizing administration of the assets of a governmental agency, without the presence of the State, and so *held* as to the statute of South Carolina providing for winding up the State Liquor Dispensary.

The consent of a State to be sued in its own courts by a creditor does not give that creditor the right to sue in a Federal court. *Chandler* v. *Dix*, 194 U. S. 590.

Even though state legislation and decisions as to the construction of state statutes may not be controlling upon this court, yet they may be persuasive.

Although by engaging in business a State may not avoid a preëxisting right of the Federal Government to tax that business, the State does not thereby lose the exemption from suit under the Eleventh Amendment. *South Carolina* v. *United States*, 199 U. S. 437, distinguished.

The legal history of the constitutional provisions and legislative enactments of South Carolina in regard to the State Liquor Dispensary, reviewed.

161 Fed. Rep. 152, reversed.

THE facts are stated in the opinion.

Mr. B. L. Abney, with whom *Mr. J. Fraser Lyon* was on the brief, and *Mr. W. F. Stevenson*, for petitioners:

The commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay the same over out of the fund. The assets are still the assets of the State. Being officers of the State, with the funds of the State in their possession belonging to the State, and these suits being brought by alleged creditors of the State, the State is the real party in interest, and the suit is virtually against the State. See opinion below; *McHose* v. *Dutton*, 55 Iowa, 728; *Brown University Case*, 56 Fed. Rep. 55; *Yale College Case*, 52 Fed. Rep. 177; *Lowery* v. *Thompson*, 25 S. Car. 416; *Board &c.* v. *Gantt*, 76 Virginia, 455; *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 177 U. S. 52.

The state dispensary commission are not defending any case of trespass or of wrongs they may have committed towards the persons or property of the complainants under an unconstitutional statute; nor are they affirmatively, through and by means of an unconstitutional statute, injuring the complainants or invading any of their property rights; nor are they attempting to enforce an unconstitutional statute. Consequently, this case does not fall within any class of cases mentioned by the court below, nor is it similar to any of the cases

cited by that court. The action of the court if plaintiff succeeds will have the effect of depriving the State of funds or property in its possession. This conflicts with the Eleventh Amendment. *Louisiana* v. *Jumel*, 107 U. S. 711; *Farmers' National Bank* v. *Jones*, 105 Fed. Rep. 459; *Christian* v. *Atlantic &c. R. Co.*, 133 U. S. 233; *Brown University* v. *R. I. College*, 56 Fed. Rep. 55; *Lowery* v. *Commissioners of Sinking Fund*, 25 S. Car. 416; *Board of Public Works* v. *Gantt*, 76 Virginia, 455.

The act of 1907 did not create a trust nor divest the State of all control or disposal of the state dispensary property. It simply authorizes claimants to sue or to have their claims established against it, and to be paid out of a certain fund. Allowing such claims to be established and sued on could not be construed as admitting the validity of the claim. *Bank* v. *State*, 60 S. Car. 465.

The statute books of the State contain instances where the legislature has seen fit, instead of making the investigation through its own committees, to devolve this duty upon certain persons as commissioners or upon regularly appointed tribunals. But no state decision has ever held that by such act a contract was created between the State and the claimants, which disabled the legislature from either modifying or repealing such statute. *Campbell* v. *Sanders*, 43 S. Car. 577.

If the act of 1907 is nothing more than the creation of a commission before which the State authorizes its creditors to sue and to have their claims established and adjusted, then it cannot amount to a contract irrevocable, and this court has repeatedly so decided: *Beers* v. *Arkansas*, 20 How. 527; *Railroad Co.* v. *Tennessee*, 101 U. S. 337; *Railroad Co.* v. *Alabama*, 101 U. S. 832; *Hans* v. *Louisiana*, 134 U. S. 17; *Baltzer* v. *North Carolina*, 161 U. S. 245; *Ex parte Alabama*, 23 Am. Rep. 567; *In re Ayers*, 123 U. S. 507; *De Saussure* v. *Gaillard*, 127 U. S. 216.

The State by this act expressly devolves the right and duty upon the commission to investigate, determine and ascertain the just liabilities against it held by these claimants, and does

not authorize suits to be brought against it to establish such liabilities either in its own courts or in the Federal courts. *Smith* v. *Reeves*, 178 U. S. 436; *Chandler* v. *Dix*, 194 U. S. 590; *Maury* v. *Commonwealth*, 92 Virginia, 310.

The highest court of the State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statutes. *Batchel* v. *Wilson*, 204 U. S. 36.

The Federal courts will follow, in this case, the decision of the Supreme Court of the State construing the act of 1907, unless this court shall take the view that that act created a contract with the claimants, creditors of the State, which the State cannot, by subsequent legislation, interfere with. *Elmendorf* v. *Taylor*, 10 Wheat. 150; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *McCullough* v. *Virginia*, 172 U. S. 102; *Mobile Trans. Co.* v. *Mobile*, 187 U. S. 480; *Jack* v. *Kansas*, 199 U. S. 372; *Bacon* v. *Texas*, 163 U. S. 207; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *De Saussure* v. *Gaillard*, 127 U. S. 216; Lewis' Sutherland Stat. Constr., par. 313.

Where the Federal courts are not by rule bound to follow the decisions of the state courts in cases falling within the exception, they will consider such decisions upon the point in question and will incline to an agreement with the state courts. *Mead* v. *Portland*, 200 U. S. 163; *Blair* v. *City of Chicago*, 201 U. S. 400; *Copper Mining Co.* v. *Territorial Board &c.*, 206 U. S. 474; *Theological Seminary* v. *Illinois*, 188 U. S. 662; *Tampa Waterworks* v. *Tampa*, 199 U. S. 241; *Douglas* v. *Kentucky*, 168 U. S. 502.

Mr. Daniel W. Rountree, with whom *Mr. Clifford L. Anderson* and *Mr. Thomas B. Felder* were on the brief, also argued for petitioners.

Mr. Alfred S. Barnard, with whom *Mr. George B. Lester* was on the brief, for respondent, the Fleischmann Company:

The winding up act of 1907 created a trust, and the funds in the hands of the commission are a trust fund held by them for the benefit of the creditors of the state dispensary.

If an individual debtor had by a written instrument similar in terms to the act of 1907, placed property or funds in the hands of another to be used as directed in said act, that person would become a trustee. Eliminating all of the foreign matter in this case, it is a plain suit in equity, brought by a *cestui que trust*, to compel a trustee, holding property for his benefit, to perform the duties imposed upon him by the instrument creating the trust. The only novel feature in this case, and that is more apparent than real, is that the trust was created by a State. But this is not new and involves no new principle, for that a State or sovereign can create a trust and that a trust so created is enforceable in a court of equity, see Perry on Trusts (5th ed.), § 30; Beach on Trusts and Trustees (1897 ed.), § 3; *Commissioners* v. *Walker*, 6 How. 143; *Board of Liquidation* v. *McComb*, 92 U. S. 541; *Chaffriax* v. *Board of Liquidation*, 11 Fed. Rep. 638; *Swasey* v. *N. C. R. R. Co.*, 23 Fed. Cas. 518.

The same principle is clearly recognized in *Louisiana* v. *Jumel*, 107 U. S. 711; *Vose* v. *Internal Improvement Fund*, 28 Fed. Cas. 1226; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662. See also *McKee* v. *Lamon*, 159 U. S. 317; *Bearing* v. *Dabney*, 16 Wall. 1; *Clews* v. *Jamieson*, 182 U. S. 461, 479, 480; *Gibbs* v. *Green*, 54 Mississippi, 592; *Maenhaut* v. *New Orleans*, 2 Woods, 108.

This court is not bound by the decision of the Supreme Court of South Carolina, construing the act of 1907. The record shows that this decision was rendered in a proceeding in the Supreme Court of South Carolina to which these complainants were not parties, and after the complainants had filed their bills in the United States Circuit Court for the District of South Carolina, and that court had taken jurisdiction and construed the act of 1907. The complainants were therefore entitled to the independent judgment of the United States Circuit Court in construing that act; and this case is not within the rule which requires this court to follow state decisions in the construction of state statutes. *Pease* v. *Peck*, 18

How. 595; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Carroll County* v. *Smith*, 111 U. S. 556; *Anderson* v. *Santa Anna Trp. Co.*, 116 U. S. 356; *Pleasant Improvement Co.* v. *Ætna Life Ins. Co.*, 138 U. S. 67; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 533; *Wicomico County* v. *Bancroft*, 203 U. S. 112.

This is not a suit against the State. This suit is brought by the complainants as creditors of the state dispensary to compel the defendants to perform specific duties which the legislature of the State has directed them to perform. The purpose of the suit is not to require the defendants to do that which the law of the State forbids, but to compel them to do what the statute says they shall do. *Rolston* v. *Commissioners*, 120 U. S. 390.

The Eleventh Amendment is of necessity limited to those suits in which the State is a party to the record. In deciding who are parties to a suit the court will not look beyond the record. Making a state officer a party, does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. *Osborne* v. *Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 220; *United States* v. *Lee*, 106 U. S. 196; *Board of Liquidation* v. *McComb*, 92 U. S. 531.

Recent cases in which the court says it will, in determining who are the real parties to the suit, look beyond the record, such as in *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon &c. R. R. Co.*, 109 U. S. 455; *Hagood* v. *Southern*, 117 U. S. 70; *In re Ayres*, 123 U. S. 492, can be distinguished as in those cases there was no trust created, and there was no specific fund which the complainants were seeking to reach.

The State is not claiming any interest in the fund in the hands of these defendants, and in order to enforce the trust imposed by the act of 1907, the State is neither a necessary, nor an indispensable, party. *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Swasey* v. *N. C. R. R. Co.*, 23 Fed. Cas. 518; *Chaffraix* v. *Board of Liquidation*, 11 Fed. Rep. 632; *Tindall* v. *Wesley*, 167 U. S. 220. See also *Ex parte Young*, 209 U. S. 158; *Western*

Union Tel. Co. v. *Myatt*, 98 Fed. Rep. 335; *Atlantic Coast Line R. R. Co.* v. *Virginia Corporation Commission*, 211 U. S. 210.

Mr. T. Moultrie Mordecai, with whom *Mr. Frank Carter*, *Mr. Simeon Hyde* and *Mr. H. C. Chedester* were on the brief, for respondent, the Wilson Distilling Company.

Mr. Justice White delivered the opinion of the court.

The State of South Carolina in the year 1892 assumed the exclusive management of all traffic in liquor. To carry out this purpose a board of control was created, composed of the governor, the comptroller general and the attorney general, clothed with power to supervise the system of liquor traffic which the act embodied and to adopt general rules and regulations pertaining to the subject. All liquor intended for consumption was required to be bought by an officer styled a commissioner, upon whom was cast the duty of distributing the liquor to local officials, known as dispensers. The funds to initiate the business were drawn from the state treasury. The general features of the act of 1892 were preserved in a statute approved January 2, 1895. Acts S. Car. 1895, p. 721. This last-mentioned act is set out in full in a marginal note to the opinion in *Scott* v. *Donald*, 165 U. S. 58. In that case it was recognized that the act of 1895 provided for the purchase by the State, through its officers or agents, of all liquor to be sold in South Carolina, and although the act was held to be repugnant to the Constitution of the United States, the ruling was not based upon the conception that there was a want of governmental power in the State to become the sole purchaser and seller within its borders of liquor, but exclusively upon the ground that particular provisions contained in the statute discriminated against the products of other States. A new state constitution was ratified, which went into effect from and after December 31, 1895. Therein it was provided as follows:

Article VIII, section 11, Constitution, 1895.

"In the exercise of the police power the general assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The general assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State, under such rules and restrictions as it deems proper; or the general assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the general assembly shall not delegate to any municipal corporation the power to issue license to sell the same."

Article XI, section 12, Constitution, 1895.

"All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicant liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this article; and if, after said application, there should be a surplus, it shall be devoted to public school purposes, and apportioned as the general assembly may determine: *Provided, however*, That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquor or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

Under these provisions, in 1896 (Acts S. Car. 1896, p. 123) a new law concerning the liquor traffic was enacted. The statute provided for the election by the general assembly of a state board of control, clothed with power to purchase all liquors for use in the State. A state commissioner, to be appointed by such board, was empowered to furnish liquors to the various local dispensaries provided for in the statute, which were under the immediate authority of county boards having power to appoint officers, known as dispensers, to sell liquors direct to consumers. The act of 1896 was amended in particulars, not necessary to be detailed, in March, 1897. In *Vance* v. *Vandercook, No. 1*, 170 U. S. 438, the contention that the act of 1896, as amended by the act of 1897, was repugnant to the commerce clause of the Constitution of the United States, was passed upon. The limited ruling made in *Scott* v. *Donald* was stated. It was expressly held that the act in question was a manifestation of the police power of the State, and therefore was within the purview of the provisions of the act of Congress commonly referred to as the Wilson Act. It was decided that as the provisions in the prior act, which were held in *Scott* v. *Donald* to be discriminatory, had been eliminated, the act was not repugnant to the commerce clause of the Constitution in so far as it exerted the absolute control of the State over the purchase and sale of liquor within the State.

In *State* v. *Farnum*, 73 S. Car. 165, decided in 1905, the Supreme Court of South Carolina interpreted the dispensary act of 1896 as amended, and expressly held that "The offices and places of business of the dispensary stand precisely in the same relation to the State as the State Treasurer's office." And, speaking of the dispensary system, it was said (p. 171):

"The State has undertaken to take charge of the liquor business of the State, and to prohibit any private person or corporation from dealing in liquor, except as they may find warrant in the Constitution and laws of the United States."

The law of 1896, as amended, was repealed on February 16, 1907. Acts S. Car. 1907, p. 463. The repealing act did away

with the general control of the traffic by means of a state board, and therefore abolished that board. Instead of the system previously existing a more local one was substituted. The question whether liquor should be sold in a particular county was left to the voters of the county. If, as the result of an election, it was determined that the traffic in liquor should exist in the county, it was provided that such traffic should be exclusively carried on by means of county boards, appointed by the governor. Conformably to the constitution, these boards were authorized to buy, "in the name of the State," liquors to be sold within the county, with a proviso, however, restricting the liability of the State to the sum of the assets of the local dispensary.

On the same day that the foregoing act was approved there was also approved a statute, entitled "An act to provide for the disposition of all property connected with the State dispensary and to wind up its affairs." The text of this act is in the margin.[1] Summarily stated, the act created a commission to

[1] AN ACT to Provide for the Disposition of all Property Connected with the State Dispensary, and to Wind Up Its Affairs.

SECTION 1. *Be it enacted by the General Assembly of the State of South Carolina*, That immediately upon the approval of this act the governor shall appoint a commission of well-known business men, consisting of five members, none of whom shall be members of the general assembly, to be known as the state dispensary commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said commission shall immediately organize by the election of a chairman and secretary from their number.

SEC. 3. It shall be the duty of said commission to close out the entire business and property of the state dispensary except real estate, and including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State except to county dispensary boards, and all liquors illegally bought by the present management may be returned to

consist of five members, to be appointed by the governor, who were required to give bond to the State for the faithful discharge of their duties. To this body was given the control of all the funds, assets and property, other than real estate, of the state dispensary. It was made the duty of the commission to investigate all facts concerning outstanding claims against the state dispensary, and for that purpose to employ counsel as might be approved by the attorney general, and such expert accountants and clerks as were necessary, and to make full report to the governor on the subject. The commission was also authorized, after investigation, to pay, from the proceeds of the dispensary assets which might come into its hands, such claims as were found to be valid and to turn over the surplus to the state treasury.

The commission thus authorized was appointed and began the discharge of its duties. To this end a list of the outstanding claims asserted to be due was made up and a hearing concerning their amount and validity was commenced. For the purpose

the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the attorney general, and such expert accountants and stenographers and any other person or persons the commission may deem necessary for the ascertainment of any fact or facts connected with said state dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided further*, That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged: *Provided*, That they shall receive no compensation for services rendered on this commission after January 1, 1908.

SEC. 5. The said commission shall pay to the state treasurer, after deducting their compensation and other expenses allowed by this act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employés as they may

of this hearing a call was made by the commission for the production by the parties asserting claims of original books of entry, showing the previous transactions with the State from which the claims arose and the production for oral examination of certain witnesses. The right of the commission to enter upon this investigation was disputed by some of the claimants and they refused to comply with the call made for books and papers and the production of witnesses. Thereupon certain of such claimants invoked the authority of the Circuit Court of the United States for the District of South Carolina by the commencement of the suits which are now before us. The first was brought against the members of the commission by the Wilson Distilling Company, a New Jersey corporation, having its principal place of business in the city of Baltimore, the bill being filed not only on its own account but on behalf of all others who might join in the cause. The complainant in the second suit, which was also against the members of the commission, both officially and individually, was the Fleischmann Company, an Ohio corporation. Without detailing the proceedings by which

---

deem necessary, and to contract with them at the time of employment for their compensation.

SEC. 7. The said commission shall submit to the governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the state dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

SEC. 8. That said commission shall have full power and authority to investigate the past conduct of the affairs of the dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the dispensary, as prescribed by an act to provide for the investigation of the dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the commission provided for under this act: *Provided*, That for the purpose of the investigation of the affairs of the dispensary, as herein provided, each and every member of said commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole commission.

Approved the 16th day of February, A. D. 1907.

other claimants were joined as co-complainants in the Wilson suit and by which the relief sought in that case and in the Fleischmann case—which was somewhat divergent in the earlier stage of the litigation—was made to harmonize, it suffices to say that in their ultimate form both bills of complaint rested the jurisdiction of the court upon diversity of citizenship, asserted the existence of a valid claim against the dispensary fund in favor of each complainant for liquor sold, and that each was entitled to be paid out of the fund in the hands of and under the control of the commission. The bills also proceeded upon the theory that the act of 1907 had placed the assets of the dispensary in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against the fund, which they were entitled to enforce by judicial action against the commission, without the presence of the State as a necessary party. Upon this assumption and upon the averment that the members of the commission were refusing to discharge the duty cast upon them by the state law, of ascertaining and paying the just claims against the trust fund, an injunction was prayed, restraining the commission from in any way disposing of the fund until the claims of the complainants were paid. A receiver was also asked for the purpose of taking charge of the assets, paying the valid claims against the same, including those of the complainants, and otherwise settling, under the direction of the court, the affairs of the state dispensary.

In both cases a temporary restraining order was allowed, and a rule was granted to show cause why an injunction *pendente lite* should not be made and a receiver appointed as prayed. Again omitting detail as to the form of the pleadings, it suffices to say that, by return to the rules to show cause and by answers, the commission, besides traversing most of the averments contained in the bills, set up in substance that each suit was against the State, and that the State had not consented to be sued, and could not be impleaded without violating the Eleventh Amendment to the Constitution. It was expressly averred that the assets and property in the hands of the commission belonged to

the State, were held by the commission as its agent and could not be administered without the presence of the State, which was an indispensable party to the cause. The claim was also made that the commission was a judicial tribunal and was not subject to be restrained by an injunction from a Federal court.

After the allowance of the temporary restraining order in the Fleischmann case, various banks in which the commission had deposited to its credit dispensary funds were made parties defendant, and enjoined from paying out such funds except upon the order of the court. Subsequently, in the same case, after a hearing on January 29, 1908, upon the rule to show cause, an order was entered on March 2, 1908, continuing the temporary restraining order until the final determination of the suit. The motion for the appointment of a receiver was, however, continued without prejudice. The opinion of the court is reported in 161 Fed. Rep. 152. A like order was also cotemporaneously entered in the Wilson case, and in that case, likewise, an order was entered on March 5, 1908, making the banks who had the dispensary funds on deposit parties defendant, and restraining them from paying them out. In this connection it is to be remarked that the banks who were thus restrained in both cases, as security for the dispensary funds placed with them by the commission, had each delivered to that body bonds, stock and other collaterals, and the same had been by the commission deposited in the state treasury.

After the submission and before the court had decided the rules to show cause the legislature of South Carolina passed two statutes concerning the state dispensary fund. By the first the winding up act of 1907 was amended by increasing the compensation of the commission, by directing the sale of the dispensary real estate, etc., and the payment out of the fund of a certain judgment for damages. The eleventh section of the act was amended so as to read as follows:

"SEC. 11. That said commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the dispensary, and to

pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the dispensary which have been, or may hereafter be collected by said State dispensary commission: *Provided*, That each and every person, firm or corporation presenting a claim or claims to said commission shall have the right to appeal to the Supreme Court as in cases at law: *Provided further*, That notice of intention to appeal shall be served upon said commission within ten days of rendition of judgment by the said commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court." Laws 1908, p. 1289.

By the second act the commission was directed to pay fifteen thousand dollars into the state treasury, to be used for the expenses of criminal prosecutions for violations of the laws relating to "the late institution called the State dispensary." The commissioners refused to pay out of the dispensary funds in their hands the fifteen thousand dollars directed by the last-mentioned statute, on the ground that they were under an injunction from the Circuit Court of the United States. Thereupon the attorney general of the State began proceedings by mandamus in the Supreme Court of South Carolina to compel compliance with the act. The case was decided on March 14, 1908. The court, in an elaborate, careful and perspicuous opinion, reviewed the dispensary legislation, expressly held that the statutes governing the same made the State the purchaser of the liquors bought for consumption, and, therefore, that those who had sold the liquor to the state dispensary had contracted with the State, and with the State alone; that all the assets and property of the dispensary belonged to the State, and that the commissioners appointed to wind up and liquidate its affairs were state officers, entrusted with a public duty on behalf of the State. As a result of these conclusions it was determined that the Circuit Court of the United States was without jurisdiction to enjoin the commissioners as state officers from disposing of the state property as the state statute di-

rected, and therefore a right existed to a peremptory mandamus. The issuing of the peremptory writ, however, was left in abeyance, the court—doubtless for the purpose of avoiding an unseemly conflict with the Circuit Court—saying that it would not assume "that the construction which it has placed upon the state constitution and the statutes in question will be disregarded by the Federal court." 79 S. Car. 316. A few days before this decision was announced, and in consequence of representations made to the Circuit Court that a bill had been introduced in the general assembly of South Carolina directing the commission to turn into the state treasury the dispensary funds, the Circuit Court appointed the members of the commission temporary receivers of the fund, with directions to hold the same subject to the orders of the court. Subsequently, on March 9, 1909, the Circuit Court entered an order, consolidating the two causes, and appointing three persons receivers of the dispensary fund, two of those thus appointed being at that time, or having been shortly prior thereto, members of the commission.

Following the decision of the Supreme Court of South Carolina in the case last referred to, and on March 27, 1908, the defendants in the consolidated causes filed a motion "for an order revoking the former orders of the said court, granting an injunction and appointing receivers, on the ground that the Supreme Court of South Carolina has now construed the statutes of South Carolina and the constitution of the said State, under which the complainants claim their rights, and has construed it differently from the said Circuit Court's construction which construction, if followed, ousts the jurisdiction of the Circuit Court." The motion was denied. 161 Fed. Rep. 162. Thereafter the Wilson Distilling Company, by leave, filed in the consolidated cause an amendment to its bill, setting up the claim that the "acceptance by the defendants constituting the said dispensary commission, as trustees, of the trust created by said act [of February 16, 1907], and the acceptance by the complainants and the other creditors of said State dispensary, as *cestuis*

que trust, of the benefits of the trust so created, constituted a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States, and of article 1, section 10, thereof, the protection whereof is hereby expressly claimed by your orators." Following said averment it was alleged that the act approved February 24, 1908, heretofore referred to, was repugnant to Art. I, § 10, of the Constitution of the United States, and to the Fourteenth Amendment, "for that same impairs and attempts to impair the obligation of the contract set out in the last preceding paragraph hereof, and deprives and attempts to deprive the complainants of their property without due process of law, and denies, and attempts to deny, to them the equal protection of the law, in violation of the aforesaid provisions of the Constitution of the United States," In a separate paragraph it was averred that the object and purpose of the institution of the mandamus suit in the state court "was to hinder, delay and defeat the enforcement by this court of the trust created by said act of 1907, and the administration of said trust by this court in the above-entitled causes." The Circuit Court on its own motion made an order directing the payment to the attorney general of South Carolina of the sum of fifteen thousand dollars upon his application therefor, and modified the former orders of the court to the extent necessary to permit the receivers to make such payment.

To reverse the interlocutory orders granting an injunction *pendente lite* and appointing receivers, an appeal was prosecuted to the Circuit Court of Appeals for the Fourth Circuit by the three members of the commission then in office, officially and individually, and by certain of the banks which had been made defendants. The Circuit Court of Appeals on September 15, 1908, affirmed the action of the lower court. 162 Fed. Rep. 1. This writ of certiorari was thereupon allowed.

Underlying all the contentions made in the cause is the fundamental question whether the suits were in substance suits against the State, and therefore beyond the jurisdiction of the

Circuit Court, because of the express prohibition of the Eleventh Amendment. As that question is the pivotal one, we come at once to its consideration.

If we consider as an original question the provisions of the constitution of South Carolina on the subject and the terms of the statutes of that State establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers, or agents, of liquor for consumption in South Carolina, were purchases made by the State for its account, and, therefore, that the relation of debtor and creditor arose from such transactions between the State and the persons who sold the liquor. And this irresistible conclusion, arising from the very face of the constitution and statutes, is removed beyond all possible controversy by the decision of this court in *Vance* v. *Vandercook, No. 1, supra*, and by the construction given by the Supreme Court of South Carolina to the state statute prior to the commencement of this litigation, in *State* v. *Farnum, supra*, as well as by the convincing opinion expressed by that court in reviewing the state statutes in the mandamus case already referred to as reported in 79 S. Car. 316.

We could not therefore sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the State can be compelled by compulsory judicial process to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a State cannot, against the objection of the State, be maintained in a court of the United States. Thus, in *Hagood* v. *Southern*, 117 U. S. 52, where, in suits brought in a court of the United States against officers and agents of the State of South Carolina, the holders of certain revenue scrip of the State endeavored to enforce the redemption thereof according to the terms of the statute, in pursuance of which the scrip was issued, which statute was al-

leged to constitute an irrepealable contract, the court said (p. 87):

"Though not nominally a party to the record, it [the State] is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' "

In the subsequent case of *Christian* v. *Atlantic & N. C. Railroad*, 133 U. S. 233, by bill in equity, filed in a court of the United States, it was attempted to reach dividends on the stock of the defendant railroad company, and apply such dividends to the payment of the bonds issued by the State of North Carolina, and for the sale of stock owned and held by the State. It was contended for the complainants that the proceeding was *in rem* against the stock to enforce a right in and to it resulting from an alleged contract by which the stock was pledged for the benefit of the complainants, although the stock was not actually delivered to the alleged pledgee. It was held that the mere declaration by the State in a statute that stock held by it was pledged did not technically operate to create a pledge. Upon the hypothesis that a mortgage of the stock might have been effected, it was said (p. 243):

"The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign State, no such pro-

ceeding can be maintained. The mortagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the Eleventh Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Louisiana* v. *Jumel*, 107 U. S. 711; *Parsons* v. *Marye*, 114 U. S. 325; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443."

The complainants below, however, insist that if it be conceded that under the state dispensary statutes the relation of the State and the sellers of liquor was that of debtor and creditor, the general assembly of South Carolina in the winding up act of 1907 intended to and did alter that relation, because the State, by that act, renouncing its control over the assets of the state dispensary, vested the commission with the title to such assets as trustees of an express trust, and constituted the creditors of the State who had furnished supplies for the use of the dispensary the beneficiaries of such trust. The argument being that hence the suits are not against the State, and therefore are not within the inhibition of the Eleventh Amendment. It cannot be and is not denied that the construction of the winding up act, upon which the contention rests, is contrary to that entertained both by the general assembly of South Carolina and by the highest court of the State, but it is urged that the statutes of 1908, in respect to the dispensary fund and the opinion of the Supreme Court were, the former enacted and the latter announced after this litigation was commenced. But if we assume that the legislation and decision referred to are not controlling, yet they are persuasive. Aside from this, however, considering the text of the winding up act, we are of opinion that there is no just ground for the conclusion that the State, in providing by that legislation for the liquidation of the affairs

of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the State as to authorize a judicial tribunal to take the assets of the State out of the hands of those selected to manage the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the State.

An interpretation of the act in question, producing such an abnormal and extraordinary result as that just stated, cannot be adopted merely because it might be sustained by strained implications. On the contrary, such interpretation could only be warranted if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction. Coming to consider the act, it is patent that neither by express language nor by necessary implication does it convey the meaning which the proposition seeks to give to it. In form the winding up statute is but an ordinary act of legislation, providing, in the interest of the State, for an examination and liquidation of the claims against the dispensary and their payment out of the state assets when liquidated, so as to secure the State against unjust claims and preserve its interest in the fund. The act does not, in express terms, make any change in the theretofore existing relation of debtor and creditor between the State and the vendors of liquor under the state dispensary act. The conception that an irrevocable trust was intended to be created is negatived by the requirement in the first section, for the giving by each member of the commission of a bond for the sum of ten thousand dollars, conditioned for the faithful performance of the duties imposed. So also the wide discretion vested in the commission by § 3, empowering it to arrive at a determination as to the legality of purchases of liquor previously supplied by a full investigation of the circumstances "surrounding all contracts for liquors," and subjecting to the approval of the attorney

general of the State the employment of counsel to make such investigation, precludes the inference of an intention on the part of the general assembly to terminate its control over the fund. And the fact that the legislature deemed that the statute was but an ordinary act of legislation over a subject designed to be continued within legislative control is, we think, clearly manifested in the eighth section of the act, which reads as follows:

"SEC. 8. That said commission shall have full power and authority to investigate the past conduct of the affairs of the dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the dispensary, as prescribed by an act to provide for the investigation (27) of the dispensary, approved January 24th, A. D. 1906, be and hereby is, conferred upon the commission provided for under this act; provided, that for purposes of the investigation of the affairs of the dispensary as herein provided, each and every member of said commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole commission."

The absence in the winding up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the State had abandoned all property right in the funds placed in the hands of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the State to confine the determination of the amount of its liability to claimants, to the officers or agents chosen by the State for that purpose. And it is elementary that even if a State has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the State in a court of the United States. *Smith* v. *Reeves*, 178 U. S. 436, and cases cited; *Chandler* v. *Dix*, 194 U. S. 590. The situation, therefore, was not changed as a result of the subsequent act of February 24, 1908, giving the creditors of the State,

whose claims might be adversely acted upon by the commission, the right to a review in the Supreme Court of the State.

The decision of the questions arising upon this record relating, as they do, to rights and remedies of a mere contract creditor of the State of South Carolina, is not in anywise controlled by the ruling in *South Carolina* v. *United States*, 199 U. S. 437, where, although recognizing that official dispensers of liquors under the laws of South Carolina were agents of the State, it was held (p. 463) "that the license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are the agents of the State, which has itself engaged in that business." That case was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a preëxisting right of taxation possessed by the Government of the United States. The ruling in this case but enforces an exemption of the State from suit in the courts of the United States upon its contract debts, an exemption which existed by virtue of the Constitution of the United States at the time when the legislation was enacted out of which the alleged contracts arose.

Deciding as we do that the suits in question were suits against the State of South Carolina, and within the inhibition of the Eleventh Amendment, the decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause remanded to that court with instructions to dismiss the bills of complaint.

And it is so ordered.

THE CHIEF JUSTICE took no part in the consideration or disposition of this case.